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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB, individually and as Representatives of the Class of Reston, Virginia Homeowners,

Petitioners,

v.

VIRGINIA STATE BAR and
FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Lewis H. Goldfarb and Ruth S. Goldfarb, individually and as representatives of the class of Reston, Virginia homeowners, hereby respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the District Court and its findings of fact (Appendix A, *infra*, pp. 1-15) are reported at 355 F. Supp.

491. The Stipulation of Facts agreed to by the parties is not officially reported but is set forth at pages 16-20 of Appendix A. The opinion of the Court of Appeals (Appendix B, *infra*, pp. 1-24) is reported at 497 F.2d 1.

JURISDICTION

The judgments of the Court of Appeals were entered on May 8, 1974 (Appendix C, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Are bar associations which promulgate a minimum fee schedule exempt from the price fixing prohibitions of the antitrust laws because the restraint on competition is among the members of a "learned profession"?

2. Does a restraint of trade by attorneys in the fixing of fees for title examinations in connection with obtaining mortgages on real estate in Northern Virginia, substantially restrain commerce among the several States, where the undisputed evidence shows that a substantial portion of these mortgages involve (a) loans made from persons outside of Virginia, and/or (b) guarantees by agencies of the Federal Government headquartered in Washington, D.C., and/or (c) the purchase of a home by a non-resident of Virginia?

3. Is the Virginia State Bar exempt from the antitrust laws under the doctrine of *Parker v. Brown* for its role in a price fixing arrangement utilizing minimum fee schedules even though there is no statute authorizing the promulgation of such schedules, and where the only independent state agency involved, the Virginia Supreme Court, did

not approve either the fee schedules themselves, the reports of the State Bar which led to their adoption, or the opinions of the State Bar which provided the enforcement mechanism for obtaining adherence to such schedules?

STATUTE INVOLVED

The statute involved, the Sherman Antitrust Act, 15 U.S.C. §1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

STATEMENT

A. FACTS

On October 26, 1971, the named plaintiffs in this action, Lewis H. and Ruth S. Goldfarb, contracted to purchase a $54,500 home in Reston, Virginia. The contract provided that the closing would take place at the offices of A. Burke Hertz, a Virginia attorney, who maintained his office in Falls Church which, like Reston, is in Fairfax County (App. A, p. 16).

As a condition of obtaining a mortgage for their home, the Goldfarbs were required to obtain title insurance to cover the mortgagee's interest (Exhibit 32, ¶15, sec. 7).[1] Under ethical opinions issued by the Virginia State Bar,

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[1] References to Exhibits are to the Exhibits admitted in evidence, with numbers 1-32 having been admitted by stipulation.

the giving of an opinion as to the state of a title to real property cannot be done by a title insurance company but must be done by a private attorney. Therefore, on November 23, 1971, the Goldfarbs wrote Mr. Hertz concerning the possible utilization of his services to perform the required title examination, as well as for other matters relating to the purchase of their home (Exhibit 2). Their letter indicated a desire to minimize the cost of obtaining title insurance and noted that their realtor had estimated that an attorney would charge them approximately $522 for the title examination alone, the amount as determinated by the fee schedule of the local bar associations. On December 8, 1971, Mr. Hertz replied, indicating that it was "the policy of this office to keep our charges in line with the minimum fee schedule of the local Bar Association" (Exhibit 3).

Thereafter, the Goldfarbs sent letters to 36 other attorneys in Northern Virginia to inquire about fees for title examination services (Stip. ¶ 6, App. A, p. 17). Nineteen written replies were received (Exhibits 6-24), all of them indicating adherence to the fee schedule not only by the responding attorney, but by other members of the bar as well. These responses left no doubt that the efforts of the Goldfarbs to obtain a title examination for less than the prescribed minimum fee would fail. Therefore, at the January 15, 1972, closing on their house, the Goldfarbs utilized the services of Mr. Hertz and were charged $522.50 for a title examination – precisely the amount calculated under the minimum fee schedule.

The minimum fee schedule referred to by these attorneys was promulgated in 1969 by the defendant Fairfax County Bar Association in conjunction with the bar associations of Loudoun and Arlington counties and the City

of Alexandria (Exhibit 29). For title examinations, the minimum fee is 1% of the first $50,000 of the loan or purchase price, whichever is greater, one-half of one percent from $50,000 to $100,000, one-quarter of one percent between $100,000 and $1,000,000 and a negotiated amount thereafter (Exhibit 29, p. 25).

The requirement of adherence to these minimum fee schedules is imposed by the Virginia State Bar. The State Bar, which was created by the Virginia Supreme Court pursuant to statutory authority, is an integrated bar, meaning that every attorney licensed to practice in Virginia must be a member of it and pay annual dues to it (Stip. ¶¶ 9 and 11, App. A, p. 17-18). In contrast, the local bar associations which actually publish the fee schedules are purely voluntary organizations of attorneys who practice in a particular locality (Stip. ¶ 13, App. A, p. 18).

The Supreme Court of Virginia has promulgated rules and regulations governing the conduct of attorneys and the operation of the State Bar. The State Bar is required by statute and court rule to investigate alleged violations of these standards of conduct and to report its findings to a court of appropriate jurisdiction which undertakes any disciplinary proceedings (Stip. ¶ 11, App. A, p. 18). Relying upon the authority given to it by the Virginia Supreme Court to issue opinions on questions of ethics, the State Bar has issued Opinions 98 and 170 (Exhibits 30 and 31) which, in substance, state that it is unethical for an attorney habitually to charge fees below those suggested in a minimum fee schedule, and that sanctions may be imposed by the State Bar against an attorney who violates that ethical proscription. Thus, the threat of sanctions for a violation of Opinions 98 and 170 stands behind the minimum fee schedules promulgated by the local bar associations.

In addition, the State Bar issued reports on the subject of minimum fee schedules in 1962 and 1969 (Exhibits 26 and 27). Those reports included suggested local fee schedules that were the basis for the minimum fee schedules adopted and published by the local bar associations. In fact, the suggested fees for title examination adopted by the Fairfax County Bar Association in both 1962 and 1969 were virtually identical to those suggested in the State Bar Reports.

B. PROCEEDINGS IN THE DISTRICT COURT

On February 22, 1972, the Goldfarbs filed suit in the United States District Court for the Eastern District of Virginia, Alexandria Division, on behalf of themselves and a class of persons who had purchased homes in Reston, Virginia, during the four-year period preceding the filing of the complaint, and who had been unlawfully charged title examination fees in accordance with the minimum fee schedule. Named as defendants in this action were the Virginia State Bar and the bar associations of Fairfax and Arlington counties and the City of Alexandria.

The complaint alleged that the defendants had violated the Sherman Antitrust Act, 15 U.S.C. §1, by the operation of the minimum fee schedule system, under which adherence by attorneys to the schedule promulgated by the local bar associations was compelled by the State Bar. The State Bar's compulsion was brought about by its issuance of Opinions 98 and 170, which, in effect, threatened attorneys with disciplinary proceedings if they did not follow the fee schedule. In addition, the complaint alleged that the issuing of the 1962 and 1969 State Bar Reports, which led to the promulgation of the virtually identical

local bar association minimum fee schedule, also made the State Bar a co-conspirator. Petitioners contended that, as a result of the minimum fee schedule system, the members of the plaintiff class had been overcharged for title examinations in connection with the purchase of their homes. The complaint asked for treble damages, as well as declaratory and injunctive relief against the continued operation of the minimum fee schedule system.

After discovery was conducted, a pre-trial conference was held at which it was agreed to sever the trial on liability from that on damages. On September 27, 1972, the District Court, without objection by the respondents, certified this action as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure and, after extensive oral argument, denied the motions of the defendants for summary judgment.[2] Thereafter, plaintiffs entered into a settlement with the defendants Alexandria Bar Association and Arlington County Bar Association, under which those two associations agreed to withdraw their fee schedules, to advise their members of the withdrawal, and to refrain from publishing any minimum or suggested fee schedules in the future, in exchange for which all damage claims against the two associations were dismissed with prejudice.

The trial took less than half a day because the bulk of the facts had been agreed upon by stipulation of the parties. The defendants renewed their contentions previously made by motion that there was no liability on their part because (1) there was an insufficient connection between the activities of defendants and interstate commerce, (2) lawyers, as

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[2] Individual notice by plaintiffs was sent to the approximately 2400 members of the plaintiff class, and additional notice by publication in the *Reston Times* was also made.

members of a learned profession, were exempt from the Sherman Act, and (3) their actions were those of the State and hence immune under *Parker v. Brown*, 317 U.S. 341 (1943). Following the submission of proposed findings of fact, conclusions of law, and post-trial memoranda, the District Court issued its memorandum opinion and made findings of fact (App. A). It ruled that the defendant Fairfax County Bar Association had violated the antitrust laws and was liable for damages to the members of the plaintiff class, but found on *Parker v. Brown* grounds that the State Bar was not liable, a claim that it had previously denied.

The Court first found that the operation of the minimum fee schedule system was a contract, combination, and conspiracy in restraint of trade, and specifically declined to create an exemption for the pricing practices of attorneys, noting that "fee setting is the least 'learned' part of the profession" (App. A, p. 5). From the evidence which showed that the rates charged for title examinations were not in most cases based on factors other than the minimum fee schedule, and from the evidence concerning the efforts of the Goldfarbs to obtain legal services at rates below the fee schedule amounts, the Court concluded that there was significant adherence to the fee schedule (Findings 6-8, App. A, p. 8), which resulted in damage to the Goldfarbs (App. A, p. 4).

As for the commerce issue, the trial judge concluded that, with respect to real estate transactions in Northern Virginia, and particularly in Fairfax County, a significant amount of interstate commerce was affected by the use of these schedules. Based upon what the Court considered to be "a fair sampling of loans made on real estate in Fairfax County" (App. A, p. 4), it found that more than

half of the money loaned came from out-of-state sources. Plaintiffs' witness had examined one of every ten chronological deed books for the years 1970 and 1971 for Fairfax County, and this examination showed that more than $75,000,000 of the loans came from out of state just for that sample (Finding 2, App. A, p. 7). In addition, the Court relied on the fact that millions of dollars of loans guaranteed by the United States Veterans Administration and United States Department of Housing and Urban Development, both of which were headquartered in the District of Columbia, had been made in the Northern Virginia area, with particularly large amounts for Fairfax County in the years 1968-72 (App. A, p. 4; Findings 3 & 4, App. A., p. 7). The Court also noted the large percentage of persons who live in Fairfax County but who work outside Virginia (App. A, p. 4), and found that substantial numbers of persons who had lived outside of Northern Virginia in 1965 had moved into Northern Virginia by the year 1970 (Finding 1, App. A, pp. 6-7). Accordingly, the Court concluded that the requirement of "commerce among the several states" in 15 U.S.C. §1 had been met.

The final defense raised was that defendants' conduct was immune under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). With respect to the defendant Fairfax County Bar Association, the Court rejected this argument, noting both the voluntary nature of the association and the fact that the group freely adopted the minimum fee schedule (App. A, pp. 5-6). The Court stated that the "fact that the State furnishes a vehicle for its enforcement upon complaint does not extend immunity to the local bar association" (App. A, p. 5).

The Court refused, however, to hold the State Bar liable for what the Court described as "its minor role in this

matter" (App. A, p. 6). It found that the actions taken by the Bar were within the scope of its statutory or rule-created authority and hence were actions of the State and not those of private persons (*Id.*). It noted that there had never been any action taken by the State Bar to discipline an attorney for charging less than the minimum fee schedule and that, in view of the declaration of illegality of the fee schedule of the local bar association, any need for injunctive relief against the State Bar was removed (*Id.*). Thereafter, the Court entered an order, the form of which had been agreed to by the parties, enjoining the further enforcement or use of Fairfax's minimum fee schedule. That order contained an appropriate direction pursuant to Rule 54(b) of the Federal Rules of Civil Procedure and stayed all further proceedings in the District Court until the appeals of the plaintiffs and the Fairfax County Bar Association could be decided.

C. THE DECISION OF THE COURT OF APPEALS

The Court of Appeals, with Senior Circuit Judge Boreman writing for the majority, affirmed that part of District Court's decision granting immunity to the State Bar, but reversed the judgment entered against the Fairfax County Bar Association, holding that the activities involved were immune under a "learned profession" exception to the antitrust laws and that there was an insufficient showing of an effect upon interstate commerce to sustain jurisdiction under the Sherman Act.

Initially, the Court discussed the applicability of the state action doctrine of *Parker v. Brown* to the State Bar. It correctly identified the three *Parker* requirements of a legislative command limiting competition, the presence of

an agency of the State, and the vesting of authority for the final decision with that State agency rather than with a private person. With respect to the requirement of a "legislative command" to engage in the particular activities, the Court focused on section 54-48 of the Virginia Code, which authorizes the Virginia Supreme Court to promulgate rules and regulations defining the practice of law and prescribing a code of ethics and procedures for disciplining attorneys. The Court of Appeals observed that the "desired goal of the Code of Professional Responsibility is to benefit clients and the public in general. . ." and that it would be "manifestly unfair to dissect a state's regulatory program into its various component parts, parts that were meant to interrelate, and then to declare that because some factors may benefit those to be regulated, the program falls outside the *Parker* exemption" (App. B, p. 10). Based upon this analysis, the majority concluded that the Virginia Code "gave the Virginia Court the power to restrict competition among those in the legal profession" since it was the "Virginia legislature that created the machinery for regulation" (App. B, p. 12). The majority reached this conclusion despite the fact that there is not a word in any of the Virginia statutes which even mentions minimum fee schedules or restrictions on competition, much less which sanctions their use.

Turning to the second *Parker* condition – the presence of a state agency – the Court declined the invitation of the State Bar to rule that the Bar, which is comprised wholly of lawyers, could create antitrust immunity for itself by its approval of its own activities (App. B, p. 11). It did hold, however, that the Supreme Court of Virginia was sufficiently independent to provide the required State agency activity for purposes of *Parker v. Brown*.

As to the final requirement under *Parker*, the Court acknowledged that the Virginia Court must "*actively* supervise the State Bar" (App. B, p. 11, emphasis in original). It observed that the Virginia Court initially gave the authority to the State Bar to issue fee schedules and opinions similar to Opinions 98 and 170 concerning adherence to such schedules, and that the Court officially adopted the Code of Professional Responsibility, which in discussing the proper method of setting fees mentions the use of local fee schedules (See App. A, p. 9). It also noted that the Virginia Court has employed suggested fee schedules in establishing attorney's fees in cases before it.

However, the most important aspect of the immunity determination was the Court's reliance on its earlier decision in *Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438 F.2d 248 (1971). The Court there held that inaction by the state utility commission with regard to a proposal before it did not necessarily constitute a lack of active supervision required for immunity, on the theory that it is "just as sensible to infer that silence means consent, *i.e.* approval." *Id.* at 252. The majority below thereupon concluded that because the Virginia Court "has the authority to regulate and supervise the State Bar[,] we will not infer abandonment of that authority because of claimed inactivity. The active independent state supervision required in *Parker* is provided here by the Virginia Court" (App. B, p. 11).

In his dissenting opinion, Judge Craven, who was the author of the *Washington Gas Light* opinion, observed that the Virginia Supreme Court "will be surprised to learn that it is engaged in *active* supervision of the State Bar's implementation of minimum fee schedules in Virginia. I find nothing in the record to suggest that the Virginia

Court even knew that the Fairfax County Bar Association had a minimum fee schedule, or that it approved it either directly or indirectly through the State Bar" (App. B, p. 21, emphasis in original). Judge Craven, however, went on to exonerate the State Bar because of its "exceedingly 'minor role'" in this matter (App. B, p. 21). In his view, the State Bar did no more than to suggest the adoption of minimum fee schedules by local bar associations and to circulate reports on the schedules that were adopted.[3]

No member of the panel found that *Parker v. Brown* protected the Fairfax County Bar Association, and thus it was necessary to examine the other defenses since the court found it "abundantly clear . . . that the fee schedule and the enforcement mechanism supporting it act as a substantial restraint upon competition among attorneys practicing in Fairfax County" (App. B, p. 13). The majority then determined that there is a limited exemption from the antitrust laws for the "learned professions," relying on two cases[4] which "hold" that one engaged in the practice of a profession does not follow a trade and that his activities are not the subject of commerce (App. B, p. 13 and notes 33 and 34). In explaining its ruling, it observed that the occupation of one who violates the Sherman Act

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[3] In discussing the involvement of the State Bar, Judge Craven made no mention of the stipulated facts that the State Bar Reports were the basis of the local fee schedules and that the existence of Opinions 98 and 170 is a "substantial influencing factor" in the adherence by Virginia lawyers to such fee schedules (Stip. ¶¶15 & 20, App. A, pp. 18-19).

[4] *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 653 (1931); and *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922). The Court also noted *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 573 (1944) (dissenting opinion of Chief Justice Stone).

is irrelevant, but that there must be a restraint upon trade or commerce (App. B, p. 15). The majority then stated that a restraint upon the interstate sale of health insurance would be unlawful,[5] but that "if a group of doctors conspire to restrain the practice of another doctor there is no Sherman Act violation because that which is restrained (*i.e.*, the practice of a learned profession, medicine) is neither trade nor commerce."[6] The Court of Appeals thereupon resolved the case before it as follows:

> With that distinction in mind, it should be clearly discernible that the impact of the Association's fee schedule in the instant case upon competition among attorneys for real estate work is not within the Sherman Act. *Id.*

The basis of this distinction was properly rejected by Judge Craven in his dissent (App. B, pp. 23-24), and its applicability to this case is difficult to support since the restraint is not on the legal profession but on the fee-setting practice of lawyers. Nonetheless, the majority observed that "where the restraint is upon the learned profession itself . . . the promulgation of a fee schedule has a sufficient part in the overall scheme devised by the State of Virginia to regulate the legal profession to claim the form of limited immunity to antitrust prosecution available under the 'learned profession' exemption" (App. B, p. 15).

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[5] Citing *American Medical Ass'n. v. United States*, 317 U.S. 519 (1943).

[6] App. B, p. 15, citing *Riggall v. Washington County Medical Society*, 249 F.2d 266 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958).

Although the holding on the "learned profession" issue would seem to have disposed of the case, the majority then proceeded to determine that petitioners also had not established a sufficient connection with interstate commerce to make the Sherman Act applicable.[7] The Court focused its attention on the allegations that the restraint occurred in connection with the financing and insuring of home mortgages by inflating a component part of the cost of securing housing. After reviewing the findings of the District Court, the majority concluded that the fact that persons involved in the purchase of these homes worked outside of Virginia is "totally irrelevant" (App. B, p. 16), even though those purchasing the services may have crossed state lines for the sole purpose of doing so. *Id*, citing *Elizabeth Hospital, Inc. v. Richardson*, 269 F.2d 167, 170 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Spears Free Clinic & Hospital v. Cleere*, 197 F.2d 125 (10th Cir. 1952); and *Kallen v. Nexus Corp.*, 353 F. Supp. 33 (N.D. Ill. 1973). It further held that the act of a borrower in securing mortgage money from an out-of-state lender makes neither the selling of the house nor the supplying of incidental legal services, interstate activity (App. B, p. 17). It went on to observe that the "fact that those services are occasionally used by persons who simultaneously engaged in an ancillary interstate transaction to facilitate the conduct of that transaction is merely 'incidental' [and] does not justify Federal regulation of competitive restraints upon a business which is 'wholly local' in character" (App. B, p. 18).

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[7] The majority opinion contains a cryptic sentence which indicates that the learned profession discussion may have been merely *dicta*: "Since that which is allegedly restrained is not a learned profession, the 'learned profession' exemption does not apply here." (App. B, p. 15).

Judge Craven, dissenting, pointed to the findings of the District Court regarding the millions of dollars of out-of-state funds loaned each year for Northern Virginia homes, the interstate guarantees by the Veterans Administration and the Department of Housing and Urban Development, the travel and movement of persons into Northern Virginia, and the large percentage of persons who live in Fairfax County who work outside of Virginia. He concluded that the Northern Virginia housing market "cannot realistically be considered a purely local market" (App. B, p. 22). Relying on this Court's opinions in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), and *United States v. Women's Sportswear Mfgs. Ass'n*, 336 U.S. 460 (1949), he concluded that the price-fixing agreement "has a sufficient impact on interstate commerce to come within the Sherman Act" (App. B, p. 22).

REASONS FOR GRANTING THE WRIT

In recent years the fee setting practices of lawyers have become an increasingly debated topic.[8] Last fall a subcommittee of the Senate Judiciary Committee held six days of hearings on legal fees,[9] two days of which were devoted to the issue of minimum fee schedules. At the time that this action was commenced, there were minimum fee schedules in use in thirty four states (Stip. ¶ 26, App. A, p. 20). Following the decision in the District

[8] See App. B, p. 19, n. 57.

[9] Hearings, Legal Fees, Before the Subcommittee on Representation of Citizens Interests of the Committee on the Judiciary, United States Senate, 93rd Cong., 1st Sess. (1973) (hereinafter "Hearings on Legal Fees").

Court, a great many of these schedules were withdrawn, and some states were considering doing so.[10] It seems likely, however, that this trend will be arrested because of the decision below, and there may even be attempts to reinstate those schedules which were abandoned because of fear of litigation. Real estate settlement costs, with particular emphasis on the very practices challenged here, have also been a focus of much recent attention as many concerned citizens have begun to consider ways to reduce these expenses to a reasonable level.[11]

It is and has been for some time the position of the Department of Justice that minimum fee schedules are unlawful under the Sherman Act.[12] Finally, on the day following the decision in the Court of Appeals in this case, the Justice Department fulfilled its long-standing promise[13] and filed suit challenging the use of minimum fee schedules. *United States v. Oregon State Bar*, Civil No. 74-362 (D. Ore., filed May 9, 1974). In doing so, the Justice Department continued its pattern of contesting the legality of

[10] See Hearings on Legal Fees at 195-196; *American Bar News*, Vol. 19, No. 5, pp. 1, 3-4 (June 1974).

[11] See *e.g.*, Hearings on Legal Fees at 66-70 and Hearings, Real Estate Settlement Costs, Before the Subcommittee on Housing of the Committee on Banking and Currency, House of Representatives, 93rd Cong., 2d Sess. (1974).

[12] See Hearings on Legal Fees, Statement of Acting Assistant Attorney General Bruce Wilson, 164-174, as well as the texts of prior statements by various officials in the Antitrust Division, submitted for the record, pp. 174-185.

[13] Hearings on Legal Fees at 164-165, 184.

anticompetitive activities by professional societies. [14] However, if the decision below is allowed to stand, it will cast considerable doubt upon whether such professional groups can be subjected to Sherman Act liability because of their professional status and in many instances because of their allegedly local operations. Furthermore, since most professions are regulated by the States to some extent, and since States are now tending to establish some form of regulation over many heretofore unregulated service industries, [15] the expansive antitrust immunity afforded such groups by the opinion of the majority below will seriously narrow the reach of the Sherman Act.

Part IV of the majority opinion, entitled "Judicial Legislation," tacitly acknowledges the importance of the questions presented, but suggests that "the Goldfarbs urge us to depart from that line of cases" which establishes that minimum fee schedules are not subject to regulation under the Sherman Act (App. B, p. 19). To the contrary, it is not petitioners but respondents and the Court of Appeals which have departed from a long line of decisions of this Court and of other Courts of Appeals which have held practices substantially identical to those at issue here to be unlawful under the Sherman Act. It is these departures

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14 *United States v. National Society of Professional Engineers*, Civ. No. 2412-72 (D.D.C.); *United States v. American Institute of Certified Accountants*, Civ. No. 1091-72 (D.D.C.); and *United States v. American Society of Civil Engineering*, 72 Civ. 1776 (S.D.N.Y.).

15 Title 54 of the Virginia Code deals with the regulation of Professions and Occupations. Included among the thirty-six chapters are those regulating architects, barbers, contractors, dry cleaners, pharmacists, hearing aid dealers, pilots, real estate brokers, antique dealers and pawnbrokers (1972 Replacement Volume and 1974 Supp.).

from prior precedents, as well as the obvious importance of the questions presented, which provide a proper basis for granting the writ.

A. THE LEARNED PROFESSION EXEMPTION

The distinction which the Court of Appeals drew between this case and *American Medical Ass'n v. United States*, 317 U.S. 519 (1943), will not withstand analysis. In the *AMA* case this Court held that doctors who conspired to obstruct the sale of health insurance by others to the public could not escape criminal liability simply because of their professional status. Moreover, this Court specifically held that the conspiracy "aimed at restraining or destroying competition" violated the Sherman Act, 317 U.S. at 529. In this case, associations of lawyers have promulgated a fee schedule restraining the pricing decisions of lawyers, thereby preventing homebuyers from obtaining reasonably priced services for title examinations. In both cases the restraints were effectuated by professionals and operated to cause economic harm to members of the public, and accordingly, they are indistinguishable for purposes of Sherman Act liability.

This basic position, that the professional status of a Sherman Act defendant is "immaterial," [16] was reaffirmed in *United States v. Oregon State Medical Society*, 343 U.S. 326 (1952), although this Court held that no concerted refusal to deal had been proven there, and thus did not pass on whether the specific allegations constituted a violation of the antitrust laws. Finally, in *United States*

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16 *American Medical Ass'n v. United States*, 317 U.S. 519, 528 (1943).

v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950), a minimum fee schedule arrangement among licensed real estate brokers, far less restrictive than that involved here, was held to violate the Sherman Act. The sole dissenter pointed out that the result would also preclude use of fee schedules by doctors and lawyers, 339 U.S. at 496, yet the Court nonetheless held for the Government.

The majority below erred in failing to realize that petitioners were not seeking to utilize the Sherman Act to regulate the manner in which legal services are rendered. Petitioners have urged only that the antitrust laws are applicable when ". . . it is in an area of 'enterpreneurial' rather than professional activity that [defendants] are charged with having run afoul of the Sherman Act." *Northern California Pharmaceutical Ass'n v. United States*, 306 F.2d 379, 385 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962). As the District Court in this case noted in rejecting the "learned profession" defense, "[c]ertainly fee setting is the least 'learned' part of the profession" (App. A, p. 5).

Although the opinion below claimed that two decisions of this Court "hold" that there is a "learned profession" exemption,[17] a fair reading of those decisions[18] supports the view of Judge Craven that the language relied on is *dicta* and no more (App. B, p. 23). For example, this Court has recently had occasion to comment on the scope of the exemption for baseball from the antitrust laws, which is one of the bases for the decision below:

[17] App. B, p. 13.

[18] *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 653 (1931) and *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922).

> With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball.

Flood v. Kuhn, 407 U.S. 258, 282 (1972).[19]

Judge Craven in his dissent was clearly correct in his observation that while ". . . the practice of law is a learned profession, it is pursued for the purpose (among others) of earning a living. To that extent it falls within the strictures of the Sherman Act, and I would affirm the decision below" (App. B, p.24). Persons who engage in activities restricting commerce among the several States are not exempt from the reach of the antitrust laws because of their professional status, and this Court should grant the petition and lay to rest the claims of those relying upon ancient *dicta* to support a contrary view.

B. THE ACTIVITIES INVOLVED HERE HAVE A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE.

In determining that petitioners had failed to show that the restraints in question had a substantial impact on interstate commerce, the majority opinion was in error in placing excessive reliance upon the local application of the restraint rather than examining the interstate aspects of

[19] Not only has the exemption not been applied to other sports such as boxing and football, but it does not even extend to amateur softball. See *Amateur Softball Ass'n v. United States*, 467 F.2d 312 (10th Cir. 1972).

these transactions as a whole to determine whether they met the requirements of the Sherman Act. Petitioners demonstrated to the District Court that there were literally hundreds of millions of dollars of loans on residential property in Northern Virginia guaranteed by the United States Veterans Administration and Federal Housing Administration, both of which were located in Washington, D.C. Furthermore, a sampling of the deed books in Fairfax County showed that more than 50 percent of the mortgage money loaned for real estate in that county for a two-year period came from out-of-state. Petitioners also established that significant numbers of individuals have moved their residences from out-of-state into Northern Virginia in recent years, and the District Court found that a substantial proportion of the persons living in the area worked outside the state. Since the price fixing for title examination services operated to limit the ability of a buyer to purchase and finance a home, it is apparent that although the restraint was applied at the local level, there was a substantial impact on the millions of dollars of interstate business that was affected by this price fixing arrangement. The Court of Appeals placed far too little emphasis upon these aspects of the transaction and hence fell into conflict with decisions of this Court and those in other circuits.

Most recently this Court in *Burke v. Ford*, 389 U.S. 320 (1967), in a unanimous *per curiam* reversal of a Tenth Circuit decision, held that a territorial division among Oklahoma liquor dealers was shown to have had a substantial effect on interstate commerce where the liquor was sent from out-of-state even though the territorial division was entirely local. In this case with 50 percent of the mortgage money in the sample chosen

coming from out-of-state, the rationale of *Burke* clearly applies, and the majority's decision is inconsistent with it. As this Court said in *United States v. Employing Plasterers Ass'n*, 347 U.S. 186, 189 (1954), another decision ignored by the majority, "[t]hat wholly local business restraints can produce the effects condemned by the Sherman Act is no longer open to question."

Although relied upon by petitioners and discussed in the dissenting opinion (App. B, p. 22), the majority makes no reference at all to two other important decisions of this Court which would uphold the finding of a substantial effect on interstate commerce. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), and *United States v. Women's Sportswear Mfgs. Ass'n*, 336 U.S. 460 (1949). In the latter decision, the remarks of Mr. Justice Jackson are clearly appropriate to this case: "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *Id.* at 464. See also *Perez v. United States*, 402 U.S. 146 (1971).

Moreover, the decision below is in conflict with the holdings and the rationale of the decisions of a number of other circuits in similar situations. Most prominent among these is that of the Third Circuit in *Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48 (1973). The Court there held that plaintiffs' allegations relating to the interstate purchase of hospital services and supplies, the interstate movement of patients to its hospital, the interstate distribution of reimbursements by the defendants, the out-of-state residences of a substantial number of defendants' subscribers, as well as other facts comparable to those established here, were sufficient to bring the matter within the jurisdiction of the Sherman Act.

Similarly, a number of recent opinions of the Ninth Circuit, [20] the Fifth Circuit, [21] and the Seventh Circuit [22] support the position urged by petitioners and strongly endorsed by the dissent. Concededly, none of these cases is factually identical to the instant case, and ". . . precedent in this area is unlikely to dictate the outcome in any given case. Instead, it is more likely to communicate a general sense as to how much of an impact local activities must have upon interstate commerce before they confer jurisdiction." *Doctors, Inc. v. Blue Cross, supra* at 51. None of the cases relied upon by the majority below involved transactions having the effects on interstate commerce found here, and it should have held, as the dissent urged, that the market "cannot realistically be considered a purely local [one]" (App. B, p. 22).

Finally, the effect of sustaining this decision would be to prohibit the Congress from regulating these transactions under the Commerce Clause since, as the Ninth Circuit recently noted, "every Sherman-Act holding that jurisdiction does not lie is a holding that the evil alleged is beyond the power of Congress to control. Conversely, a

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20 *Rasmussen v. American Dairy Ass'n*, 472 F.2d 517 (1972), *cert. denied*, 412 U.S. 950 (1973), *Gough v. Rossmoor Corp.*, 487 F.2d 373 (1973), and *Copp Paving Co. v. Gulf Oil Co.*, 487 F.2d 202 (1973), *cert. granted*, 94 S.Ct. 1586 (1974) (limited to commerce questions under the Robinson-Patman and Clayton Acts).

21 *Battle v. Liberty National Life Insurance Co.*, 493 F.2d 39, 47-48 (1974).

22 *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Ass'n*, 484 F.2d 751 (1973), *cert. denied*, 414 U.S. 1131 (1974).

holding that conduct is within the reach of Congress' constitutional power for some other purpose is entitled to great weight in a Sherman Act case." *Copp Paving Co. v. Gulf Oil Co., supra*, at 204. See also *United States v. Frankfort Distilleries Inc.*, 324 U.S. 293, 298 (1945) (". . . Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied . . ."). Thus, contrary to the suggestion in the majority opinion (App. B, p. 17, n. 50), the result in this case does threaten to undermine such cases as *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and even more so its companion case *Katzenbach v. McClung*, 379 U.S. 294 (1964), which was not even mentioned by the Court of Appeals. In short, there is no decision of this Court in the modern era of construction of the Commerce Clause following *Wickard v. Filburn*, 317 U.S. 111 (1942), which sustains the majority's view of the reach of the Sherman Act. Accordingly, the writ should be granted with respect to this question as well.

C. THE PARKER v. BROWN ISSUE.

It has been more than thirty years since this Court decided *Parker v. Brown*, 317 U.S. 341 (1943), and in the interim, although passing upon related issues, [23] this Court has not reviewed or amplified that important decision. In our view this is a particularly appropriate case to do so because the decision of the majority, relying heavily upon the Fourth Circuit's previous ruling in *Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438

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23 *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.* 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

F.2d 248 (1971), has significantly and unjustifiably broadened the state action immunity under *Parker* to an extent uncountenanced in any other circuit. [24]

The first deviation from *Parker* is the lower court's construction of the requirement that there be a "legislative command" from the State that competition is to be replaced by regulation. 317 U.S. at 350. The majority permitted the test to be met even though no mention whatsoever was made of fee schedules in any Virginia statute, and there was not the slightest indication in any legislation that Virginia intended to eliminate competition in providing legal services, as had clearly been the case with the State of California and the raisin industry in *Parker*. Second, the majority improperly determined that silence by the Virginia Supreme Court constitutes approval of, and meaningful regulation and supervision over, private action within *Parker v. Brown*. That position is unsupported by anything in *Parker* and has been referred to by one court as an "unwarranted hyperextension of *Parker*." See *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 351 F. Supp. 1153, 1203 n. 129 (D. Haw. 1972), *appeal pending*, No. 73-1513, 9th Cir. Unlike *Parker*, there was no legislative determination to limit competition here, nor was there any requirement for public hearings, detailed findings of fact by an independent State agency, or any of the other procedural and substantive safeguards present in *Parker* which led

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[24] No petition for a writ of certiorari was filed in *Washington Gas Light*. The case was settled, however, after the Fourth Circuit decided the case for defendant on two separate grounds. See 85 Harv. L. Rev. 670, 673 n. 28 (1972).

this Court to conclude that, where meaningful alternative State regulation of the challenged practices is present, the Sherman Act was not intended to override it.

Moreover, the decision below is in conflict with other decisions of this Court in the analogous area of pre-emption of antitrust laws by federal regulatory statutes. For example, in *Silver v. New York Stock Exchange*, 373 U.S. 341, 361 (1963), this Court held that antitrust exemptions founded on a regulatory statute exist "only to the extent necessary" to protect the aims of the act in question. Furthermore, in a long line of cases culminating in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), this Court has ruled that courts should be reluctant to imply exemptions from the antitrust laws based on pre-emption by other federal regulatory statutes.[25] Not only was the majority below not reluctant to find immunity, it appears to have been positively eager to do so. This Court's unwillingness to grant antitrust immunity based on other federal regulatory statutes should have dictated even greater caution where the regulation is under the control of a State agency, responsive only to a State legislature, and not to Congress; and yet the majority clearly took the opposite position.

In addition to its marked departure from *Parker* and other decisions of this Court, the result reached by the majority is inconsistent with the holdings of a number of

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[25] *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973), is not to the contrary since that decision turned upon a finding that the CAB had in fact approved the challenged transactions in which case the immunity was specifically provided for by statute.

other circuits on this issue. For example, the District of Columbia Circuit in *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (1971), *cert. denied*, 404 U.S. 1047 (1972), and the Third Circuit in *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011 (1971), denied defendants immunity even though they were government officials acting pursuant to duly enacted statutes.[26] The decisions of the First Circuit in *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, *cert. denied*, 400 U.S. 850 (1970), and the Sixth Circuit in *Bale v. Glasgow Tobacco Board of Trade, Inc.*, 339 F.2d 281 (1964), clearly would have been different if they had accepted the rationale that silence constitutes approval relied upon by the majority to find meaningful State regulation in this case. It also seems likely that the Ninth Circuit would not have permitted the result reached by the majority here because of its view that *Parker* is applicable only where there is strict legislative control over the program on which the exemption is based. See *Northern California Pharmaceutical Ass'n v. United States*, 306 F.2d 379, 386, *cert. denied*, 371 U.S. 862 (1962). See also *Ladue Local Lines, Inc. v. Bi-State Devel. Agency*, 433 F.2d 131 (8th Cir. 1970) (exemption found only with clear legislative mandate to engage in challenged activities). Finally, the Tenth Circuit in *Semke v. Enid Automobile Dealers Ass'n*, 456 F.2d 1361, 1367 (1972), has adopted the view so clearly rejected by the court here that all implied exemptions from the antitrust laws should be narrowly

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[26] Even though neither *Hecht* nor *Norman's* dealt with a statutory scheme of a State, both courts analyzed the issues in terms of *Parker v. Brown* and the cases construing it. See 444 F.2d at 936 and 444 F.2d at 1017.

construed and doubts resolved in favor of the continuing applicability of the antitrust laws.

Even more directly in point, the Fifth Circuit in *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1294 (1971), *cert. denied*, 404 U.S. 1407 (1972), stated that "not every governmental act points a path to an antitrust shelter." This view has been followed by that court in a post-*Washington Gas Light* case, *Gas Light Co. of Columbus v. Georgia Power Co.*, 440 F.2d 1135, 1140 (1971), *cert. denied*, 404 U.S. 1062 (1972), where the court specifically declined to carry the *Parker* exemption to the extent permitted in *Washington Gas Light*. Furthermore, a recent decision of the Central District of California in *United States v. Pacific Southwest Airlines*, 358 F. Supp. 1224, 1227 (1973), required that *Parker-Brown* be limited "*to combinations of which a state was the moving force . . .*" and to situations where the legislative action was "*directed, commanded* or *imposed*" (emphasis in original). That opinion interpreted *Washington Gas Light* to apply only when the State agency directed and not merely authorized the action being challenged, a reading which is directly at variance with the majority's opinion here.

Thus, it is clear that the Fourth Circuit's position on the scope and requirements of the state action exemption delineated by *Parker v. Brown* is aberrational. Accordingly, the petition should be granted in order to bring the law on this issue in the Fourth Circuit in line with *Parker v. Brown* itself and with the construction given it in the other circuits.[27]

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[27] This Court will hear argument this term in a case involving the interpretation of state action under the Civil Rights Act in

(continued)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted with respect to each of the three questions on which it is sought.

Respectfully submitted,

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August 5, 1974

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[27] (continued) *Jackson v. Metropolitan Edison Co.*, 483 F.2d 754 (3rd Cir. 1973), *cert. granted*, 94 S.Ct. 1407 (1974). In that case a utility which cut off service to non-paying customers without affording them a hearing, pursuant to regulations duly filed but not acted upon by the utility commission, argued that there is insufficient state action involved to bring it within the Fourteenth Amendment's due process limitations. The anomaly of the claim of state action exemption in the antitrust laws based on silence, while at the same time maintaining that no state action is involved where regulations are filed but not acted upon by the public utility commission, has not gone unnoticed. See *Lucas v. Wisconsin Electric Power Co.*, 466 F.2d 638, 662 (7th Cir. 1972) (en banc), *cert. denied*, 409 U.S. 1114 (1973).

APPENDIX A

Lewis H. GOLDFARB and Ruth S. Goldfarb, Plaintiffs,
v.
VIRGINIA STATE BAR and Fairfax County Bar Association, Defendants.
Civ. A. No. 75-72-A.

United States District Court,
E. D. Virginia,
Alexandria Division.
Jan. 5, 1973.

Class action under Sherman Act against County Bar Association and State Bar for injunctive relief and damages. The District Court, Albert V. Bryan, Jr., J., held that minimum fee schedule adopted by County Bar Association, consistent violations of which could subject an attorney to disciplinary measures initiated by committees of State Bar, was illegal under Sherman Act. The court further held that in its minor role with respect to such schedule, State Bar was engaged in state action and was not liable under Sherman Act, where there was no claim that any actions taken by state Supreme Court, State Bar, or council of State Bar were not within scope of their statutory or rule-created authority, and where there had never been any action taken by State Bar to discipline any attorney for consistently charging less than fee suggested in a minimum fee schedule, and no such action was contemplated.

Order accordingly.

1. Monopolies ⇐12(17)
Minimum fee schedules are a form of price-fixing and therefore inconsistent with antitrust statute prohibiting anticompetitive activities. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

2. Monopolies ⇐12(17)
A defendant's liability under Sherman Act depends not on actual adherence to proposed fee schedule but rather on mere existence of an agreement which restricts competition by price-fixing. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

3. Monopolies ⇐12(17)
Minimum fee schedule adopted by county bar association, consistent violations of which could subject an attorney to disciplinary measures initiated by committees of State Bar, amounts to a price-fixing agreement for purposes of antitrust statutes. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

4. Monopolies ⇐12(17)
Minimum fee schedule adopted by Fairfax County, Virginia, bar association sufficiently affected interstate commerce to sustain jurisdiction under Sherman Act. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

5. Monopolies ⇐12(17)
Professional legal services are a "trade" within Sherman Act declaring illegal a combination or conspiracy in restraint of trade. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

6. Monopolies ⇐12(17)
Minimum fee schedule adopted by county bar association, consistent violations of which could subject an attorney to disciplinary measures initiated by committees of State Bar, did not constitute lawfully regulated state action not subject to provisions of Sherman Act, where such schedule was a private undertaking and did not derive its authority or its efficacy from legislative command of state and would have been operative and effective without any command from legislature or Supreme Court, notwithstanding fact that state furnished a vehicle for its enforcement upon complaint. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

7. Monopolies ⇨12(1)

State cannot give immunity to those who violate Sherman Act by authorizing them to violate it or by declaring their action lawful. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

8. Monopolies ⇨12(17)

Minimum fee schedule adopted by county bar association, consistent violations of which could subject an attorney to disciplinary measures initiated by committees of State Bar, was illegal under Sherman Act. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

9. Monopolies ⇨12(1)

In its minor role with respect to illegal minimum fee schedule adopted by county bar association, State Bar was engaged in state action and was not liable under Sherman Act, where there was no claim that any actions taken by state Supreme Court, State Bar, or council of State Bar were not within scope of their statutory or rule-created authority, and where there had never been any action taken by State Bar to discipline any attorney for consistently charging less than fee suggested in minimum fee schedule, and no such action was contemplated. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

10. Monopolies ⇨12(1)

Rule that Sherman Act restrains only actions of private persons and not state action applies equally to both a state's judicial actions and its legislative actions. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

11. Monopolies ⇨28(1.7)

State Bar, as an administrative agency of the Supreme Court, was not intended to be included among those liable for damages under Clayton Act. Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

Alan B. Morrison, Washington, D. C., for plaintiffs.

Stuart H. Dunn, Asst. Atty. Gen., Richmond, Va., for defendant Virginia State Bar.

T. S. Ellis, III, John H. Shenefield, Lewis T. Booker, Hunton, Williams, Gay, Powell & Gibson, Richmond, Va., for defendant Fairfax Bar Ass'n.

MEMORANDUM OPINION

ALBERT V. BRYAN, Jr., District Judge.

This is a class action brought under the Sherman Act, 15 U.S.C. § 1, for injunctive relief and damages as allowed by 15 U.S.C. §§ 15, 26. The agreement allegedly restraining trade or commerce is a minimum fee schedule adopted by the defendant Fairfax Bar Association, consistent violations of which may subject an attorney to disciplinary measures initiated by committees of the defendant Virginia State Bar.[1]

The matter came on for hearing, on the issue of liability only, on December 13, 1972.

The Court adopts as part of its findings of fact the Stipulation of Facts entered into by the parties and filed on December 11, 1972,[2] the Proposed Findings of Fact submitted by the plaintiff numbered 1, 2, 3, 4, 5, 6, 7 and 8, the Proposed Findings of Fact submitted by the defendant Virginia State Bar numbered 1 and 2, and Proposed Findings of Fact submitted by the defendant Fairfax Bar Association numbered 6, 9, 10, 11, 12, 13, 18, 20, 21, 24, 25, 28, 29, 33, 34, 35, 36, 37, 38,[3] 49 and 54,[4] copies of which are attached hereto.

1. The Fairfax Bar Association and the Virginia State Bar are the remaining defendants in the case. Two other defendants, the Alexandria Bar Association and the Arlington County Bar Association have agreed to a consent judgment, by virtue of which they are directed to cancel their existing minimum fee schedules and enjoined from adopting, publishing or distributing any future schedules of minimum or suggested fees.

2. Stipulation No. 16 is actually a conclusion of law rather than a fact, and the Court does not adopt it or feel it necessary to the decision in this case.

[1] Minimum fee schedules are a form of price fixing and therefore inconsistent with antitrust statutes prohibiting anti-competitve activities.

Price fixing is *per se* an unreasonable restraint of trade. It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end. An agreement, shown either by adherence to a price schedule or by proof of consensual action fixing the uniform or minimum price, is itself illegal under the Sherman Act, no matter what end it was designed to serve. United States v. Real Estate Boards, 339 U.S. 485, 489, 70 S.Ct. 711, 714, 94 L.Ed. 1007 (1950).

The scope of the statutory language in the Sherman Act is so expansive that courts have been reluctant to find exceptions. The language explicitly states that "*every* contract, combination or conspiracy which restrains commerce among several states is unlawful." (Emphasis supplied.) Illustrative of this reluctance is the refusal to extend baseball's exempt status to other professional sports. See Radovich v. National Football League, 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957); United States v. International Boxing Club, 348 U.S. 236, 75 S.Ct. 259, 99 L.Ed. 290 (1955). The fact that specific exemptions are clearly delineated suggests that ambiguities should be resolved in favor of inclusion. This is especially true where price-fixing is involved since it has been declared both pernicious and lacking in any redeeming social value. Northern Pacific Ry. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1957); United States v. National Ass'n. of Real Estate Boards, *supra*; see also United States v. Trenton Potteries Company, 273 U.S. 392, 397, 47 S.Ct. 377, 71 L.Ed. 700 (1927):

> [T]he aim and result of every price-fixing agreement, if effective is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of to-morrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints.
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> . . .

[2] The minimum fee schedule actually proposes a floor upon which professional fees should be set. This type of price-fixing has been held under other circumstances to be repugnant to the philosophy of the Sherman Act. Plymouth Dealers Ass'n. v. United States, 279 F.2d 128 (9th Cir. 1960). It is contrary to the spirit of competition which sustains a free enterprise system in that it prevents competitors from using their own judgment in determining the value of their own services. Kiefer-Stewart Co. v. Seagram and Sons, 340 U.S. 211, 213, 71 S.Ct. 259, 95 L.Ed. 219 (1951). Although attorneys can violate the proposed fee schedule (at the risk, of course, of being subjected to a charge of unethical conduct) a defendant's liability under the Sherman Act depends not on actual adherence to the schedule but rather on the mere existence of an

3. Although the title insurance companies have a right to look to the individual attorney who examined the title for indemnification, the evidence is that there is no known case where such indemnification was ever actually sought. Of course, the specific fee complained of here by the plaintiffs, which is the title examination fee of 1% of the first $50,000 of purchase price plus ½% of all over $50,000, is *in addition* to the title insurance premium.

4. Since the hearing on December 13 was devoted solely to the issue of liability, it was understood in advance that no testimony with regard to the amount of any damages would be presented.

agreement which restricts competition by price-fixing. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); Plymouth Dealers Ass'n. v. United States, *supra*.

There is no distinction between the benefits ascribed to the minimum fee schedule by its advocates and those existing in a minimum sales price if, for example, the latter were to be adopted by General Motors and Ford Motor Company as to suggested sales prices for comparable automobiles. In each instance, a new dealer and a new lawyer, both unfamiliar with the customary charges in the field, would find such a minimum fee or sales price schedule helpful in setting charges. In each instance an adequate fee or price would insure a margin of profit adequate to assure further research and development or continued legal education. In each instance the public would be assured, by an examination of such schedule, that what was being charged was in line with what was generally charged in the field. Yet in none of these instances would a member of the public have any better idea that the fee or price was reasonable after he had seen the schedule than he did before. The minimum fee schedule for real estate settlements, based as it is on a percentage of the purchase price, is particularly hard to justify as having any relation to the labor involved. This is particularly so in view of the fact that the "responsibility" involved is assured by a separate charge for title insurance. The attorney's ultimate "responsibility" is illusory. *See* Footnote 3, *supra*. Such an across-the-board rate, coupled with the testimony of both Goldfarb as to his efforts to obtain legal services, and Attorney F. Shield McCandlish that a flat fee results in some overcharges which make up for undercharges, is sufficient for the Court to infer, which it does, that some damage resulted to the plaintiff.

[3] Having concluded that it is a price fixing agreement, there remain the questions whether the activity constitutes or substantially affects interstate commerce, whether professional legal services are a trade within the meaning of the Sherman Act, and whether the activities involved constitute lawfully regulated state action not subject to the provisions of the Sherman Act under Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). All of these questions are raised as defenses by both remaining defendants. They will be considered in the order mentioned.

[4] The facts found by the Court reveal (from what the Court considers a fair sampling of loans made on real estate in Fairfax County, Virginia, and the area generally serviced by the defendant Fairfax Bar Association, in which is located the subdivision of Reston whose residents make up the plaintiff class) that a significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia. All or nearly all of the lenders making such loans require, as a condition of making the loan, that the title to the property involved be examined and that title insurance be furnished and paid for by the home buyer-mortgagor. This alone warrants the conclusion that interstate commerce is sufficiently affected to sustain jurisdiction under the Sherman Act. There is also uncontradicted evidence that a large percentage of persons who live in Fairfax County work outside of Virginia and that significant amounts of loans on Fairfax County real estate are guaranteed by the United States Veterans Administration and Department of Housing and Urban Development, both headquartered in the District of Columbia. The fees charged for the title examination and insurance just mentioned are covered by the minimum fee schedule here in question. Accordingly, the Court concludes that the requirement of "commerce among the several states" of 15 U.S.C. § 1 is met.

[5] Whether lawyers are exempt from the Sherman Act because they perform personal services as a learned profession has never been squarely met by the Supreme Court. Although the Supreme Court declined to intimate the correctness of applying the term "trade"

to professions, it has declared the services of real estate brokers to be a commercial activity carried on for profit regardless of the fact that each is in business on his own. United States v. National Ass'n. of Real Estate Boards, *supra*, 339 U.S., at 490, 492, 70 S.Ct. 711.

> The fact that the business involves the sale of personal services rather than commodities does not take it out of the category of "trade" within the meaning of § 3 of the [Clayton] Act. Id. at 490, 70 S.Ct. at 715.

Hence, despite dicta by that court, this Court is unwilling to rest its decision on such an exemption. The Court has some question whether the adoption of a minimum fee schedule is itself "professional." It seems to the Court that there is a basic inconsistency between the lofty position that professional services, not commodities, are here involved and the position that a minimum fee schedule is proper. The former properly contemplates differences in abilities, worth and energies expended of those rendering the services. Such differences are made as meaningless by a minimum fee schedule as they would be by a maximum fee schedule. Although there is as yet no evidence of this here, the minimum fee schedule does permit the charging, by an attorney, of more than the services are worth. Certainly fee setting is the least "learned" part of the profession.

The third question is the most difficult in the Court's view. In this regard it is important to point out just what is done by the various entities involved.

Va.Code Ann. § 54-59 (1972 Repl.Vol.) authorizes the Supreme Court of Virginia to "prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of the attorneys at law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court under this article to a court of competent jurisdiction for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof in good standing."

[6-8] Pursuant to this authority the Supreme Court of Virginia has promulgated rules and regulations governing the conduct of attorneys and the operation of the Virginia State Bar as found in Sections II and IV, Part 6, Rules of the Supreme Court, 205 Va. 1011, as amended January 1, 1971, and 210 Va. 411 (1/19/70). As stipulated (Stipulations 10 and 11) the powers of the Virginia State Bar have been delegated to the Council of the Virginia State Bar, the Virginia State Bar is required by statute and rule to investigate alleged violations of the standards of conduct mandate by the Virginia Supreme Court, and the Virginia State Bar has been given authority to issue opinions on matters involving questions of ethics. It is stipulated that the Supreme Court of Virginia has stated that suggested fee schedules involved such questions of ethics (Stipulations 17 and 18). Pursuant to its acknowledged authority the State Bar has issued Opinions 98 and 170 (Plaintiff's Exhibits 30 and 31) which in effect say that it is unethical habitually to charge fees below those suggested in a minimum fee schedule. The Fairfax Bar Association has adopted a minimum fee schedule although it was under no compulsion to do so. The minimum fee schedule of the Fairfax Bar Association is a private undertaking and did not derive its authority or its efficacy from the legislative command of the State and would have become operative and effective without any command from the legislature or the Supreme Court. Parker v. Brown, *supra*. The fact that the State furnishes a vehicle for its enforcement upon complaint does not extend immunity to the local bar association. Indeed, the State cannot "give immunity to those who violate the Sherman Act by authorizing them to violate it or by declaring their action is lawful." Parker v. Brown, *supra*, 317 U.S., at 351, 63 S.Ct., at 314. The State here has not specifically retained the ultimate power to control private action, and the private persons who make up

the Fairfax Bar Association are allowed unbridled freedom to select their own course of conduct. Allstate Insurance Co. v. Lanier, 361 F.2d 870 (4th Cir. 1966), cert. denied 385 U.S. 930, 87 S.Ct. 290, 17 L.Ed.2d 212 (1966); Asheville Tobacco Board of Trade v. F.T.C., 263 F.2d 502 (4th Cir. 1959). Since the Fairfax Bar Association has selected its own course of conduct, the antitrust laws remain in full force and effect as to it. Its minimum fee schedule is declared to be illegal under 15 U.S.C. § 1, enjoinable under 15 U.S.C. § 26, and the case against it shall be set down for trial for the ascertainment of any damages provable under 15 U.S.C. § 15.

[9, 10] In its minor role in this matter, the Virginia State Bar was engaged in state action. There is no assertion that any actions taken by the Supreme Court of Virginia, the Virginia State Bar, or the Council of the Virginia State Bar were not within the scope of their statutory or rule—created authority.[4] The rationale behind the holding of Parker v. Brown, *supra*, that the Sherman Act restrains only actions of private persons and not state action, applies equally to both a state's judicial actions and its legislative actions. Whatever force or efficacy the Virginia State Bar had in rendering opinions and supplying the enforcement machinery for violations of ethical conduct it derived from the judicial and "legislative command of the State and was not intended to operate or become effective without that command."

The claim against the Virginia State Bar is even less persuasive when the specific relief sought is examined. Insofar as injunctive relief under 15 U.S.C. § 26 is concerned, that is only allowable when there is a threatened loss or damage by a violation of the antitrust laws. Here the uncontradicted evidence is that there has never been any action taken by the Virginia State Bar to discipline any attorney for consistently charging less than the fee suggested in a minimum fee schedule. Nor is any such action contemplated. Moreover the decision by the Court as to the illegality of the fee schedule insofar as the Fairfax County Bar Association is concerned removes the only ground upon which discipline could be sought.

[11] Insofar as damages are concerned, it is stipulated that the Virginia State Bar is an administrative agency of the Supreme Court of Virginia. Aside from any Eleventh Amendment considerations, such an agency was surely never intended to be included among those liable for damages under 15 U.S.C. § 15.

Counsel for plaintiff should prepare an order incorporating this memorandum by reference; declaring illegal and directing cancellation of the minimum fee schedule of the Fairfax Bar Association; enjoining that association from adopting, publishing, or distributing any future schedules of minimum or suggested fees; dismissing the action as to the Virginia State Bar; and continuing the case until January 26th 1973, for a determination of the method to be used in ascertaining what, if any, damages have been sustained by members of the plaintiff-class. The order should be presented for entry after submission to other counsel for approval as to form.

PROPOSED FINDINGS OF FACT BY THE PLAINTIFF ADOPTED BY THE COURT

1. According to the United States Bureau of the Census (Exhibit 33, pp. 400, 402, and 408), of the 162,396 persons five years of age or older who resided in Arlington County, Virginia in 1970, 50,590 (31.15%) resided outside of

4. It is arguable that 15 U.S.C. § 1 is a "statute" within the meaning of Va.Code Ann. § 54-51 (1972 Repl.Vol.) which precludes the Supreme Court of Virginia from adopting a code of ethics inconsistent with any statute. If the Supreme Court of Virginia adopted a minimum fee schedule, if it does not have inherent power to do so without regard to § 54-48, if a minimum fee schedule has anything to do with ethics (which this Court questions), and if, indeed, an entity can violate a statute which has been declared inapplicable to it, this might have to be met. In any event, the argument is not asserted by any party.

Virginia in 1965; of the 414,521 persons five years of age or older who lived in Fairfax County, Virginia in 1970, 129,955 (31.35%) lived outside of Virginia in 1965; of the 101,178 persons five years of age or older who resided in the City of Alexandria in 1970, 30,972 (30.61%) lived outside of Virginia in 1965.

2. An examination of deeds of trust in one of every ten chronological deed books for the years 1970 and 1971 in the office of the Recorder of Deeds of Fairfax County yielded the following information concerning the amounts of mortgages and the location or place of incorporation of beneficiaries (mortgagees):

Beneficiary located or incorporated outside Virginia	$ 75,615,096.21
Beneficiary located or incorporated inside Virginia	47,818,321.92
Beneficiary location or place of incorporation undetermined	12,847,702.84
total:	$136,281,120.97

When all deeds of trust in the amount of $100,000 or more were subtracted from the above totals, the following Adjusted Totals were obtained:

Out of State	In State	Location Undetermined	Totals (Adjusted)
$75,615,096.21	$47,818,321.92	$12,847,702.84	$136,281,120.97
(41,669,307.55)	(13,101,921.88)	(4,491,230.40)	(59,262,459.83)
$33,945,788.66	$34,716,400.04	$ 8,356,472.44	$ 77,018,661.14
(Totals Adjusted)			

3. The United States Veterans Administration, which is headquartered in the District of Columbia, guarantees loans to certain veterans under the provisions of 38 U.S.C. § 1810 for, *inter alia*, the purchase or construction of homes. The Veterans Administration guaranteed the following numbers and amounts of home loans in Northern Virginia during the fiscal years indicated:

Fiscal Year		Fairfax County	Arlington County	City of Alexandria	Totals
1968	No.	785	124	214	1,123
	Amt.	$ 20,891,705	$ 3,023,200	$ 5,144,700	$ 29,059,605
1969	No.	1,921	343	661	2,925
	Amt.	$ 55,516,775	$ 8,638,475	$17,677,650	$ 81,832,900
1970	No.	1,737	258	553	2,548
	Amt.	$ 54,663,294	$ 7,205,890	$15,631,215	$ 77,500,399
1971	No.	1,460	306	699	2,465
	Amt.	$ 49,602,652	$ 9,015,100	$22,463,425	$ 81,081,177
1972	No.	2,854	349	585	3,788
	Amt.	$105,056,807	$11,277,135	$18,935,915	$135,269,857

4. The United States Department of Housing and Urban Development, which is headquartered in the District of Columbia, insures certain home mortgages pursuant to 12 U.S.C. § 1706c et seq. The number and amount of such loans in Northern Virginia during designated fiscal years is as follows:

Fiscal Year		Fairfax County	Arlington County	City of Alexandria
1968	No.	1,377	229	150
	Amt.	$33,162,200	$4,636,200	$2,685,900
1969	No.	1,196	197	128
	Amt.	$29,041,550	$4,053,200	$2,273,650
1970	No.	927	158	134
	Amt.	$23,600,450	$3,373,350	$2,484,000
1971	No.	910	188	146
	Amt.	$25,187,250	$4,603,090	$3,089,250
1972	No.	832	148	152
	Amt.	$23,326,800	$3,729,050	$3,255,000

5. The Goldfarbs were charged a fee for the examination of the title to their home by A. Burke Hertz which was calculated in accordance with the effective Minimum Fee Schedule published by the Local Bar Associations (Exhibit 29).

6. Among attorneys who perform title examination services in connection with the purchases of homes in Northern Virginia, there is a significant degree of adherence to the Minimum Fee Schedule (Exhibit 29) in the determination of fees.

7. The Goldfarbs were not reasonably able to obtain legal services in examining the title to their home for a rate less than that set forth in the Minimum Fee Schedule of the Local Bar Associations (Exhibit 29).

8. A significant reason for the inability of the Goldfarbs to obtain legal services for the examination of the title to their home for less than the fee set forth in the Minimum Fee Schedule (Exhibit 29) was the operation of the minimum fee schedule system.

PROPOSED FINDINGS OF FACT BY THE DEFENDANT VIRGINIA STATE BAR ASSOCIATION ADOPTED BY THE COURT

1. No complaint has been received by the Virginia State Bar from any person or organization in any area of the Commonwealth with respect to the failure of a member of the Virginia State Bar to adhere to a minimum fee schedule.

2. There are no persons or agents employed by the Virginia State Bar to investigate matters of unethical conduct except and until receipt of an official complaint.

PROPOSED FINDINGS OF FACT BY THE DEFENDANT FAIRFAX BAR ASSOCIATION ADOPTED BY THE COURT

(6) The Canons of Ethics and the Code of Professional Responsibility promulgated by the Supreme Court of Virginia contemplate and approve suggested or advisory fee schedules. (See Canon 12 and Rules for Integration of the Virginia State Bar, Part 6 II EC 2-18, DR2-106.)

(9) Under the Canons of Ethics and the Code of Professional Responsibility, as promulgated by the Supreme Court of Virginia and the American Bar Association, it is unethical conduct for an attorney either to fix legal fees based solely on the recommended fees contained in an advisory minimum fee schedule without regard to other relevant factors, or, for the purpose of soliciting business, consistently to charge fees below the recommended fees. Neither the Virginia State Bar nor any of its district committees has ever received any complaint regarding either type of unethical conduct. Neither has the Virginia State Bar nor any of its district committees ever initiated or participated in any administrative or judicial action against an attorney for having engaged in either type of unethical conduct described above. (Trial Testimony) (See American Bar Association Formal Opinion 20, dated May 5, 1930; American Bar Association Formal Opinion 171, dated July 23, 1937; American Bar Association Formal Opinion 323, dated August 9, 1970.)

(10) The Virginia State Bar is authorized by the Supreme Court of Virginia to render advisory opinions on any question of contemplated professional conduct. Pursuant to this authority, the Virginia State Bar issued Opinions 98 and 170 which affirm the propriety of advisory or suggested fee schedules. (See Stipulation of Facts and Opinions 98 and 170.)

(11) In 1969 and on previous occasions, the Virginia State Bar has published Minimum Fee Schedule Reports setting forth and analyzing the existing fee schedules promulgated by various local bar associations in Virginia. (Trial Testimony)

(12) The following statement appeared on page 3 of the Minimum Fee Schedule Report published in 1969 by the Virginia State Bar:

> "The recommended minimum fee figures in the committee's report represent the consensus recommendation of members of the committee as to fees which should be assessed in 1969 for the legal services indicated."

Further, on page 11 of the Minimum Fee Schedule Report published by the Virginia State Bar in 1969, it is recommended that the fee for title examination be one percent of the first $50,000 of the loan amount or purchase price and one half of one percent of the loan amount or purchase price from $50,000 to $250,000. These provisions are essentially identical to the advisory information contained in the Minimum Fee Schedule promulgated by the Fairfax Bar Association.

(13) The Canons of Ethics and the Code of Professional Responsibility promulgated by the Supreme Court of Virginia state that, in determining charges for title examination and certification, it is proper to consider a minimum fee schedule or the fee customarily charged in the community for such services.

Canon 12

"In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

"In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment whil employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

"In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.

"In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade."

Code of Professional Responsibility
EC 2-18

"The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. Suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees. It is a commendable and long-standing tradition of the bar that special consideration is given in the fixing of any fee

for services rendered a brother lawyer or a member of his immediate family."

DR 2-106

(A) A lawyer shall not enter an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

(18) Numerous attorneys who are members of the Fairfax Bar Association have charged fees for title examination different from those suggested in the Minimum Fee Schedule. (Trial Testimony)

(20) Defendant Fairfax Bar Association has never investigated, communicated with or imposed sanctions upon any member or any other licensed attorney for failing to adhere to any minimum fee schedule. Further, defendant Fairfax Bar Association has never induced or attempted to induce any other person or organization to investigate, communicate with or impose sanctions upon any member of Fairfax Bar Association or any other licensed attorney for failure to adhere to any minimum fee schedule. (Trial Testimony)

(21) Attorneys who have handled many of the real estate closings in Reston, Virginia have not rigidly adhered to the Minimum Fee Schedule promulgated by the Fairfax Bar Association. (Trial Testimony)

(24) Mr. and Mrs. Goldfarb were residing within the Commonwealth of Virginia at the time they contracted to purchase their home in Reston, Virginia. (Trial Testimony)

(25) Both the builder who constructed the home in Reston, Virginia purchased by Mr. and Mrs. Goldfarb and the real estate agent through whom they purchased are and were located in Reston, Virginia. (Trial Testimony)

(28) All of the acts performed by A. Burke Hertz in connection with the examination and certification of the title of the land in Reston, Virginia purchased by Mr. and Mrs. Goldfarb were performed within the Commonwealth of Virginia. (Trial Testimony)

(29) All transactions relating to the purchase by Mr. and Mrs. Goldfarb of their home in Reston, Virginia, including the negotiation for sale, contract of sale, title examination, securing of mortgage loan, settlement and all legal services, occurred within the Commonwealth of Virginia. (Trial Testimony)

(33) The purpose of a title examination and certification is to assure the purchaser of real estate that the land he is purchasing will not be subject to future claims as a result of past actions by prior owners. A title examination and certification assures the purchaser of real estate the free and unencumbered use and enjoyment of his land. (Trial Testimony)

(34) The duties and responsibilities of an attorney in connection with a residential real estate transfer in Reston, Virginia include the following:

(a) Initial telephone conversations and correspondence concerning general procedures and costs.

(b) Reading contract and any correspondence associated with it.

(c) Opening file and cross indexing under seller, purchaser, lender and property.

(d) Checking on past surveyor for possible recertification.

(e) Ordering house location survey.

(f) Checking on possible reissue rates on existing title insurance policies.

(g) Examination of title (more fully described in Findings Nos. 35 and 37 *infra*.).

(h) Writing for pay-off figures and determining existing trust holders.

(i) Preparation of application for title insurance binder.

(j) Transmitting application to title insurance company.

(k) Forwarding title binder to lender.

(l) Miscellaneous telephone calls relating to fire insurance, title insurance, closing costs, payment of taxes, getting termite certification, closing procedures and order, etc.

(m) Coordination of settlement date and time with lender, agent, seller, purchaser, other attorneys.

(n) Quoting verbal closing costs to seller, purchaser, agent and lender.

(o) Preparation of settlement documents--deed, note, deed of trust, settlement statements, transmittal letters.

(p) Computing settlement statements.

(q) Fulfilling all conditions of sales contract.

(r) Completing truth in lending form and other forms required by lender.

(s) Preparation of disbursement statement.

(t) Attorney review title and file for settlement. (More fully described in Findings Nos. 35 and 37 *infra*.)

(u) Submitting documents to lender, purchaser, or another attorney for review prior to settlement.

(v) Conducting settlement(s).

(w) Sending all required papers to lender.

(x) Depositing funds.

(y) Preparation of documents for recording, including notarizing, blue-backing, initialing. (More fully described in Findings Nos. 35 and 37 *infra*.)

(z) Bring-down title. (More fully described in Findings Nos. 35 and 37 *infra*.)

(aa) Recording papers.

(bb) Writing disbursement checks.

(cc) Forwarding disbursement checks.

(dd) Preparation of Deeds of Release.

(ee) Preparation of notes for marginal release.

(ff) Releasing notes on margin of land records.

(gg) Sending Deeds of Release to Trustees.

(hh) Recording Releases.

(ii) Conforming file copies of settlement documents with recording information.

(jj) Preparation of final title insurance policy application.

(kk) Preparation of Certificates of Title.

(ll) Forwarding final title insurance applications, then policies, all recorded documents to proper parties.

(mm) Final review of file for closing.

(nn) Closing and filing of file.

(35) In the course of examining and certifying a title to real estate, an attorney in Virginia must perform at least the following steps:

(A) A search of the grantor and grantee indices for at least a sixty year period. Each index covers approximate-

ly a ten year period. Therefore, to perform a sixty year search, six to eight indices must be thoroughly examined. In Fairfax County, a search of the "land book" is also required in order to ascertain the assessed value to the landowner as of January 1.

(B) After a chain of owners is established from a search of the grantor and grantee indices for sixty years, a complete check must be made for each of these owners (known as "abstracting the title chain") on all deeds, deeds of trust, deeds of release, homestead deeds, mortgages, powers of attorney, leases, notices of *lis pendens*, mechanics' liens, chancery suits to enforce mechanics' liens, etc. All of these items might be recorded in several deed books or in a single deed book, depending upon the jurisdiction. In Fairfax County, there are separate deed books for the aforementioned items.

In making a complete check of all the owners in the chain of title, care must be taken to note for each owner the type of deed, its date, the date of recording, the consideration involved, the complete description of the land, the easements, rights of way, restrictive covenance and other impediments to the free and unencumbered use of the land and whether legal requirements for signature and notarization were met in all cases. Any suggestion of a possible interference with the free and unencumbered use of the land by the new purchaser must be noted on the abstract and evaluated by the attorney.

If the parcel of land in question derives from a larger tract of land, a plat of the original land with all its divisions must be drawn or obtained by the attorney. This task may involve converting a "metes and bounds" description usually written in terms of robs, chains, degrees, perches, acres or other measurements, into feet or to a subdivision reference of lot, block and section.

In the event that a former owner in the chain of title was one who transferred a great deal of property, each deed from that owner must be located and read to determine whether the specific property involved in the current sale was, in fact, included in an earlier deed. Where similar names occur or names have been changed, as when women marry, this might well involve reading a very large number of deeds.

(C) Often, estates and inheritances of the property appear in the chain of title. In this event, the Will Index and docket records must be checked to determine whether any flaws existed in property transfers of this sort.

(D) In all cases it is necessary to check the Judgment Lien Indices in order to discover whether any judgments are outstanding against the property. In Fairfax County, there are four sets of indices of judgments to be searched. The indexed judgments must then be checked against the judgment lien docket to determine whether the judgments indexed have been satisfied. For Reston, that must be done daily for numerous subsidiary corporations of Gulf Reston, Inc., all of which hold title to property in Reston.

(E) In Fairfax it is also necessary to check the index of financing statements on household fixtures in order to determine whether unsatisfied financing statements exist. In Fairfax County, this entails checking two sets of indices.

(F) In the event subdivision plans are involved, plat or map books must be consulted for subdivision plans not recorded in deed books. Plat books should also be checked for easements and building restrictions on the property.

(G) Oftentimes, corporate owners appear in the chain of title. In this event, questions of corporate law may arise. For example, if the sale of land included all or substantially all of the assets of the corporation which were not sold in the regular course of business, then stockholders' consent to the sale must be located and verified. In addition, in some cases, verification of the name of the officers who executed a corporate deed must be obtained from the State Corporation Commission and a check

should also be made to determine whether the corporate grantor is still in existence.

(H) In all cases, federal, state, county and town or city tax records must be checked to establish whether any unpaid taxes exist as a possible lien against the property. There are several sources for this information. First, a check must be made with the Treasurer or Commissioner of Revenue to obtain information on local real estate taxes. Attorneys must be particularly careful in this area as real estate taxes in Fairfax County are payable twice a year and reassessments are frequent.

In the event that a former owner in the chain of title is an estate, the executor of an estate should personally give an affidavit to the effect that all federal estate and gift taxes and Virginia inheritance taxes are paid or nonassessable.

(I) The possible bankruptcy of any former owner in the chain of title should be checked. This information may be found in the grantor index under the name of the bankrupt former owner. However, this information need not be recorded there and it is also necessary to check the Federal District Court records.

(J) In addition to all of the foregoing, it is sometimes necessary to check additional records such as alimony and child support decrees, special commissioner deeds, and judicial sale records.

Once all of the foregoing steps are completed, an attorney must review his findings and evaluate all possible defects noted in the chain of title. (Trial Testimony.)

(36) While a title examination in Reston generally involves the steps outlined in Finding No. 35, factors peculiar to the Reston property further complicate the procedure. These factors include:

(a) Complex financing and transfer arrangements involved in the original transaction creating Reston, including a conveyance with a leaseback and both an option and an obligation to repurchase.

(b) The existence of numerous corporate subsidiaries of Gulf Reston, Inc. set up, in part, for the purpose of holding title to various parcels in Reston.

(c) The very large number of real estate transactions occurring in Reston on a daily and weekly basis.

(Trial Testimony.)

(37) Because of the peculiar nature of Reston, the following specific steps are often followed on a daily basis in connection with the examination and certification of a title to property in Reston.

(a) The grantor and grantee indices must be checked daily and all entries added to the grantor and grantee conveyance list for Gulf Reston, Inc., John Hancock Mutual Life Insurance Company, Belwood, Inc., Bonres, Inc., Bonner Reston Associates, Pignolia, Inc., the Ryland Group, Inc. and Teeshot, Inc., and this must also be done for several other corporations at less frequent intervals. This same procedure must also be followed for all unindexed instruments.

(b) After obtaining deed book and page references, the recorded instrument is examined and either abstracted or conformed or copies made. If these are extremely lengthy orders, copies are obtained from the Clerk's office at the cost of $1.00 per page.

(c) When rights of way and easements, etc. are recorded referring to the original 6,000 plus acres comprising Reston, it is necessary to determine which of the original acreage parcels is affected. Then it is necessary to determine whether the property is presently subdivided and dedicated as a section including the many resubdivisions. This will provide an up to date record of which easements and rights of way affect any area or property in Reston.

(d) Instruments such as Gulf repurchase deeds and plats, subdivisions, ease-

ment agreements, etc. are reviewed for recording. Also a comparison is made of the metes and bounds description with courses and distances on the plat to ascertain that there are no discrepancies between the two.

(e) Unrecorded instruments furnished by Gulf Reston, Inc., Vepco, C & P Telephone, Reston Transmission, etc. are checked as to each parcel or lot being examined.

(f) Each subdivision section is broken down into blocks and block lists (as to lot) and checked against grantor list to see that the duplicate lot numbers are not recorded. If errors are found, attorney who recorded the erroneous description is notified and asked to correct same.

(g) Answer any questions as to recording data, etc. requested by Reston Engineering Department.

(h) When recording deeds and deeds of trust in the individual owner after closing, the grantor list is checked again, judgments in four different sets of judgment records are checked again and unindexed instruments in as many as four different places are also rechecked. Next, it is usually necessary to wait in line to record. Once this is accomplished, it is necessary to conform copies as to instrument number, time of recording and deed book and page numbers.

If judgment such as Internal Revenue Service, maintenance and support, etc. or any other problems are discovered, the responsible attorney must consider and determine whether the instrument can be recorded or whether the problem must first be resolved. The Gulf Reston, Inc., Palindrone Corporation and Reston, Va., Inc. lists must be checked and rechecked on every piece or parcel of property being examined up to the minute of recording as they reserve the right to grant subsequent rights of way. This also applies to each resale from one individual to another. Similarly, the Gulf Reston, Inc. record must always be rundown as though they were still the owner.

For each plat, including all notations of any type, rights of way, resubdivisions, easement agreements, etc. must be checked as to each lot or parcel.

(i) It may be necessary to conform copies in various "section files" and update title front sheets in subdivision and individual lot files.

(j) The recording deeds of dedication, resubdivisions, etc. is time consuming as it is necessary to go to the Massey Building (County Office Building in Fairfax) to accomplish the following:

(1) Each dedication must be approved by the county attorney's office on the 11th floor;

(2) Pick up the approved plat from the 7th floor;

(3) Pay any unpaid fees--7th floor;

(4) Return to the Clerk's office at the courthouse, check wach list and entry thereon;

(5) Check all the unindexed instruments, frequently as many as 50 to 80 in number;

(6) Wait in line to record and then record;

(7) Obtain recorder's receipt and fill in time, instrument number, etc., and then conform copies;

(8) Wait for the deed book and page numbers, frequently for as long as an hour or more. (Trial Testimony.)

(38) In certifying a title to real property, an attorney becomes the person ultimately liable in the event a defect is subsequently discovered. This is true even if the purchaser of the real estate secures title insurance for, in that event, the attorney's certification is to the title insurance company. If the attorney has made an error in examining or evaluating the title, the purchaser of the real estate is protected by his insurance company which, in turn, is entitled to proceed against the attorney for any error in the certification. Accordingly, the attorney bears the ultimate responsibility, ethically and financially, for the examination and certification of a title in any transfer of real property. Furthermore, the liability of the attorney is not limited by the purchase price of the property, but increases over the years as the value of the property increases, either through inflation or appreciation. (Trial Testimony.)

(49) Defendant Fairfax Bar Association does not examine and certify titles to real property or provide legal services of any kind. (Trial Testimony.)

(54) There is no evidence that the promulgation of an advisory minimum fee schedule by the Fairfar Bar Association has affected prices adversely to consumers. (Trial Testimony.)

STIPULATIONS OF THE PARTIES

1. On October 26, 1971, the Goldfarbs, who then resided at 5112 North 28th Street, Arlington, Virginia, signed a contract to purchase a home from Wellborn Properties, Inc. in the town of Reston, County of Fairfax, and State of Virginia, a copy of which is annexed hereto as Exhibit 1.

2. The builder who constructed the Goldfarbs' home in Reston and the real estate agent through whom they purchased their home both maintained their offices in Reston, Virginia at the time of the Goldfarbs' purchase.

3. The contract price of the Reston home was $54,500, to be financed by a deposit with the contract of $2,000, a down payment of $37,500 and a $15,000 loan from the Northern Virginia Savings and Loan Association, 5350 Lee Highway, Arlington, Virginia, secured by a first trust on the property. Plaintiffs purchased title insurance, which covered the interest of the mortgagee and their own interests in the property, and obtained the services of an attorney licensed to practice law in the State of Virginia for the purpose of concluding the legal aspects of the purchase, including particularly examination and certification of the state of the title to the property to be acquired.

4. The contract provided that the closing on their home would take place at the offices of A. Burke Hertz, an attorney licensed to practice law in the State of Virginia, who maintains offices at 210 Little Falls Street, Falls Church, Virginia, which is in the county of Fairfax.

5. On November 23, 1971, the Goldfarbs wrote Mr. Hertz concerning the possibility of utilizing his services

in connection with the purchase of their home, and on December 8, 1971, Mr. Hertz replied to that letter. Copies of the two letters are attached as Exhibits 2 and 3.

6. The Goldfarbs then sent letters to 36 other attorneys in Northern Virginia to inquire what fees they would charge for the title examination services. Representative samples of the two types of letters that they sent are annexed hereto as Exhibits 4 and 5.

7. Mr. Goldfarb received 19 written replies to his inquiries, copies of which are annexed hereto as Exhibits 6-24.

8. The Goldfarbs eventually utilized the services of Mr. Hertz. On January 15, 1972, the date of the closing on their home, the Goldfarbs paid Mr. Hertz $522.50 for examination of title, $25 for preparation of title insurance papers, $30 for preparation of a trust mortgage and a note, $30 for preparation of the deed, and $30 for a closing fee, for a total of $637.50. A copy of the Closing Statement is annexed hereto as Exhibit 25.

9. The State Bar is an administrative agency of the Supreme Court of Virginia created by the Supreme Court of Virginia pursuant to the laws of Virginia, including Section 54-49 of the Code. The Supreme Court of Virginia has promulgated rules and regulations governing the conduct of attorneys and the operations of the State Bar which are found in Sections II and IV of Part VI of the Rules of the Supreme Court.

10. The powers of the State Bar have been delegated to the Council of the State Bar, which is comprised of one person from each Judicial Circuit in Virginia, six persons appointed at large by the Supreme Court of Virginia, and

the President, President-Elect and immediate Past President, all of whom serve as *ex officio* members.

11. Each attorney practicing law in Virginia is required by statute and by court rule to be a member of the State Bar. The State Bar is required by statute and rule to investigate alleged violations of the standards of conduct mandated by the Supreme Court Rules, and to report its findings to a court of appropriate jurisdiction for further disciplinary proceedings.

12. Pursuant to Section 54-52 of the Code, the funds for operation of the State Bar are appropriated from a special fund of the State Treasury by act of the General Assembly. The special fund in the State Treasury consists of fees paid by members of the State Bar, the amounts of which are set, pursuant to statute, by the Supreme Court.

13. The Local Bar Associations are associations comprised of attorneys who are members of the State Bar and who, except judicial members, practice law in Northern Virginia. No attorney who practices law in Northern Virginia is required to be a member of any of the Local Bar Associations and many attorneys who practice law in Northern Virginia are not members of any of them.

14. In 1962 and 1969 attorneys who were members of the State Bar prepared on behalf of the State Bar Minimum Fee Schedule Reports, copies of which are annexed hereto as Exhibits 26 and 27.

15. Exhibits 26 and 27 became the basis for the minimum fee schedules published by the Local Bar Associations in 1962 and 1969, copies of which are annexed hereto as Exhibits 28 and 29.

16. The Virginia Statutes have given the Supreme Court of Virginia authority to make questions involving suggested fee schedules and economic reports of the State Bar and of Local Bar Associations questions of ethics under the laws of Virginia.

17. The State Bar has been given authority to issue opinions on matters which the Supreme Court of Virginia says involve questions of ethics.

18. The Supreme Court of Virginia has stated that suggested fee schedules and economic reports of the State Bar and of Local Bar Associations involve questions of ethics within the meaning of paragraph 17.

19. The State Bar has been given authority by the Supreme Court of Virginia to issue opinions on questions of ethics such as Opinions 98 and 170 which relate to minimum fee schedules and to disseminate minimum fee schedule reports, such as Exhibits 26 and 27. Copies of Opinions 98 and 170 are annexed hereto as Exhibits 30 and 31.

20. To the extent that Virginia lawyers' fees for title examinations correspond to the minimum fee schedules published by the Local Bar Associations, a substantial influencing factor is and has been the presence of Opinions 98 and 170 of the Virginia State Bar.

21. The fee of $522.50 which A. Burke Hertz charged the Goldfarbs for title examination on their home is exactly equal to the fee for such examination as calculated by the 1969 Minimum Fee Schedule of the Local Bar Associations (Exhibit 29).

22. The Supreme Court has delegated to the State Bar responsibility for investigating complaints of unprofessional conduct of any member of the State Bar. Such investigations are carried out by district committees which are comprised of attorneys. There is such a committee organized in each of the ten congressional districts of Virginia.

23. Virginia attorneys who provide legal services to prospective home buyers in Reston, Virginia are specifically prohibited by the Code of Professional Responsibility promulgated by the Supreme Court of Virginia from advertising their services or their charges for these services either within or without the State of Virginia.

24. The State Bar has never received a communication from a Local Bar Association regarding the professional conduct of any member of said Associations or of the State Bar, including failure of such members to follow a minimum fee schedule.

25. The State Bar has never initiated or participated in any administrative or judicial action against an attorney for failure to adhere to a minimum fee schedule.

26. Minimum fee schedules of some type are published and circulated in at least 34 states and in the District of Columbia either by the voluntary bar or by the counterpart of the State Bar.

APPENDIX B

FEDERAL REPORTER

VOLUME 497, SECOND SERIES

Lewis H. GOLDFARB and Ruth S. Goldfarb, Appellants,

v.

VIRGINIA STATE BAR and Fairfax County Bar Association, Appellees.

Lewis H. GOLDFARB and Ruth S. Goldfarb, Appellees,

v.

FAIRFAX COUNTY BAR ASSOCIATION, Appellant.

Nos. 73-1247, 73-1248.

United States Court of Appeals, Fourth Circuit.

Argued Nov. 7, 1973.

Decided May 8, 1974.

A class action was brought against a state bar and a county bar association to recover treble damages for violation of federal antitrust laws. Plaintiffs had sought to secure services of attorneys, at lowest possible cost, in examining title on the purchase of homes, and alleged a conspiracy to restrain interstate commerce through the use of a minimum fee schedule. The United States District Court for the Eastern District of Virginia, at Alexandria, 355 F.Supp. 491, Albert V. Bryan, Jr., J., found that the county bar association, but not the state bar, had violated the federal antitrust laws. The county bar association and the plaintiffs both appealed, and the appeals were consolidated. The Court of Appeals, Boreman, Senior Circuit Judge, held that the state bar was exempt from Sherman Act liability and that the county bar association fee schedules were within the "learned profession" exemption as a defense to a Sherman Act violation and did not restrain interstate trade or commerce.

Affirmed as to plaintiff's appeal; reversed as to county bar association's appeal.

Craven, Circuit Judge, filed an opinion concurring in part and dissenting in part.

1. Monopolies ⇨12(1)

State cannot grant immunity to those who violate Sherman Act by authorizing violations, or by declaring that their action is lawful. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

2. Monopolies ⇨12(16)

Generally, courts will not consider benefits flowing to public when applying Sherman Act to contracts, combinations or conspiracies among individuals, but courts should take cognizance of benefits accruing to public when state is involved in regulation of an industry. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

3. Monopolies ⇨12(1)

To establish valid exemption of alleged state action from operation of Sherman Act provision as to contracts, combinations and conspiracies, it must be shown that program received authority and efficacy from legislative command, that state conceived theory of control and created machinery for the program, and that statute itself gave state

officials power to restrict competition and maintain price levels. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

4. Monopolies ⇐12(1)

Consistently with Sherman Act, legislature may grant to private individuals, once subject to control and regulation, power to conduct day to day operations of program, and those individuals may even promulgate and enforce the regulations that control them, provided their activities are adequately supervised by independent state officials. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

5. Monopolies ⇐12(17)

State bar was exempt from Sherman Act liability for alleged restraint of interstate commerce through use of fixed fees. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1; Code Va.1950, §§ 54-48, 54-49, 54-50, 54-52.

6. Monopolies ⇐12(17)

County bar association which was voluntary organization composed of members of state bar practicing in county and did not derive its authority or efficacy from state and whose activities were not subject to active independent state supervision was not within "state action" exemption from liability, under Sherman Act, for alleged conspiracy to restrain interstate commerce through use of fixed fees. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

7. Monopolies ⇐12(17)

Restraints upon practice of law are not illegal per se. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

8. Monopolies ⇐12(17)

Practice of "learned profession" is neither trade or commerce, and restraints upon practice of learned profession are not per se violative of Sherman Act. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

9. Attorney and Client ⇐32, 130

Lawyer has professional duty to provide his services at reduced rate to those who need but cannot afford his services.

10. Attorney and Client ⇐32

Advertising and other forms of solicitation of business common to trade and commerce are criminal acts when utilized by lawyers. Code Va.1950, §§ 18.1-388 to 18.1-400, 54-74, 54-78, 54-79.

11. Monopolies ⇐12(17)

County bar association fee schedules were within "learned profession" exemption as defense to Sherman Act violation, and were valid insofar as effect was to restrain competition among attorneys. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1; Clayton Act, § 1 et seq.; 15 U.S.C.A. § 12 et seq.; Code Va.1950, §§ 18.1-388 to 18.1-400, 54-74, 54-78, 54-79.

12. Monopolies ⇐12(1.1)

Under Sherman Act, it is essential that alleged restraint of trade or commerce be shown to affect interstate commerce; this requirement is jurisdictional under both Constitution and Sherman Act. Sherman Anti-Trust Act, §§ 1-8, 15 U.S.C.A. §§ 1-7; U.S.C.A.Const. art. 1, § 8, cl. 3.

13. Monopolies ⇐12(17)

Where activities of county bar association and its members were carried on wholly within state, jurisdiction under Sherman Act existed only if actions complained of were shown to have "direct and substantial" effect upon interstate commerce. Sherman Anti-Trust Act, §§ 1-8, 15 U.S.C.A. §§ 1-7; U.S.C.A.Const. art. 1, § 8, cl. 3.

14. Courts ⇐406.1(4)
Monopolies ⇐28(8)

Whether actions complained of as violative of Sherman Act had direct and substantial effect upon interstate commerce was mixed question of law and fact relating to jurisdiction, and reviewing court was compelled on appeal to fully examine district court's conclusion, according deference to lower court's findings on questions of fact. Sherman Anti-Trust Act, §§ 1-8, 15 U.S.C.A. §§ 1-7; U.S.C.A.Const. art. 1, § 8, cl. 3.

15. Monopolies ⇐12(1.8)

The service may be utilized by one coincidentally engaged in interstate travel does not establish jurisdiction under Sherman Act, even where one crosses state lines for sole purpose of purchasing the service. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

16. Monopolies ⇐12(17)

County bar association's promulgation of minimum fee schedule did not affect interstate commerce within purview of Sherman Act merely because persons buying homes and paying for title examinations commuted across state lines to their jobs. Sherman Anti-Trust Act, §§ 1-8, 15 U.S.C.A. §§ 1-7; U.S.C.A.Const. art. 1, § 8, cl. 3.

17. Monopolies ⇐12(1.7)

Mere involvement of some facet of interstate commerce has never been sufficient to support jurisdiction under Sherman Act, and fact that service is occasionally utilized to facilitate interstate activities does not subject one providing such service to proscriptions of Sherman Act; to support jurisdiction, involvement must be direct and substantial. Sherman Anti-Trust Act, §§ 1-8, 15 U.S.C.A. §§ 1-7; U.S.C.A.Const. art. 1, § 8, cl. 3.

18. Monopolies ⇐12(1.7)

In considering whether particular activity has direct and substantial effect upon interstate commerce, within purview of Sherman Act, essence or nature of activity is factor to be considered. Sherman Anti-Trust Act, §§ 1-8, 15 U.S.C.A. §§ 1-7; U.S.C.A.Const. art. 1, § 8, cl. 3.

19. Monopolies ⇐12(17)

Act of borrower in securing purchase-money from out-of-state lender makes neither selling of house nor supplying of incidental legal services an interstate activity, within purview of Sherman Act. Sherman Anti-Trust Act, §§ 1-8, 15 U.S.C.A. §§ 1-7; U.S.C.A.Const. art. 1, § 8, cl. 3.

20. Monopolies ⇐12(1.8)

Fact that general local services are occasionally used by persons simultaneously engaged in ancillary interstate transaction to facilitate conduct of that transaction is merely incidental and does not justify federal regulation of competitive restraints upon business which is wholly local in character. Sherman Anti-Trust Act, §§ 1-8, 15 U.S.C.A. §§ 1-7; U.S.C.A.Const. art. 1, § 8, cl. 3.

21. Monopolies ⇐12(17)

Fee schedule system of county bar association did not restrain trade or commerce in violation of Sherman Act. Sherman Anti-Trust Act, §§ 1-8, 15 U.S.C.A. §§ 1-7; U.S.C.A.Const. art. 1, § 8, cl. 3.

Alan B. Morrison, Washington, D. C. (W. Thomas Jacks, Washington, D. C., on brief) for appellants in No. 73-1247 and for appellees in No. 73-1248.

Stuart Dunn, Asst. Atty. Gen. of Virginia, (Andrew P. Miller, Atty. Gen. of Virginia, and T. J. Markow, Asst. Atty. Gen., of Virginia, on brief) for appellee in No. 73-1247. Lewis T. Booker, Richmond, Va. (John H. Shenefield, T. S. Ellis, III, Hunton, Williams, Gay & Gibson, Richmond, Va., on brief) for appellants in No. 73-1248.

Before BOREMAN, Senior Circuit Judge, CRAVEN and FIELD, Circuit Judges.

BOREMAN, Senior Circuit Judge:

This is a class action brought by Lewis and Ruth Goldfarb on behalf of themselves and certain other homeowners in Reston, Virginia, against the Virginia State Bar (State Bar) and the Fairfax County Bar Association (Association) [1]

1. This action originally named the Arlington County Bar Association and the Alexandria Bar Association as additional codefendants. These two codefendants agreed to a consent judgment whereby they were directed to cancel their existing fee schedules and were enjoined from publishing future fee schedules.

to recover treble damages for violation of the federal antitrust laws. They allege that the State Bar and the Association have conspired to restrain interstate commerce through the use of fixed fees. Commencing with State Bar Opinion 98 issued on June 1, 1960, the State Bar announced its intention to discipline any attorney who repeatedly charged less than the fees set forth in the minimum fee schedule adopted by his *local* bar association when motivated by a desire to "increase his practice with resulting personal gain." In 1962 and again in 1969 the State Bar published a "Minimum Fee Schedule Report" intended for the guidance of local bar associations in establishing minimum fee schedules. On June 12, 1969, the Fairfax County Bar Association promulgated a "Minimum Fee Schedule" which closely followed the guidelines set forth by the State Bar. The "Minimum Fee Schedule" was described as "advisory" and was never circulated to Association members; members who desired a copy of the schedule had to specifically request it at the Fairfax County Courthouse. Nevertheless the fee schedule states that "consistent and intentional violation of the suggested minimum fee schedule for the purpose of increasing business can, under given circumstances, constitute solicitation" and result in disciplinary action as provided in State Bar Opinion 98. No disciplinary action has been brought against any member of the Association for failure to adhere to the fee schedule, although the right of the State Bar to do so was reaffirmed in State Bar Opinion 170 issued on May 28, 1971.

On October 26, 1971, the Goldfarbs contracted to purchase a home in Reston, Virginia. To finance the purchase of the home the Goldfarbs secured a home mortgage. The mortgagee required the Goldfarbs to purchase title insurance; this necessitated the employment of a Virginia attorney to conduct a title examination of the real estate to be purchased.

The Goldfarbs contacted numerous attorneys in Northern Virginia in an attempt to secure the necessary legal services at the lowest possible cost.[2] The record demonstrates that the Goldfarbs were unable to secure these services at a rate less than that prescribed by the "Minimum Fee Schedule." We accept the finding of the district court that "[a] significant reason for the inability of the Goldfarbs to obtain legal services for the examination of the title to their home for less than the fee set forth in the Minimum Fee Schedule . . . was the operation of the minimum fee schedule system."[3]

The district court severed the question of liability from that of damages. As to the State Bar the court found no liability and the Goldfarbs have appealed that decision. The court held that the Association had violated the federal antitrust laws and was liable for damages, if any, sustained by members of the plaintiff class. The Association has appealed from that decision.

These appeals have been consolidated for consideration by this court. We first address our attention to the contentions of the Goldfarbs with respect to the State Bar and then proceed to consideration of the issues raised by the Association in its appeal.

I. The Parker v. Brown Exemption

Part A—The State Bar

The Goldfarbs complain of the issuance of the 1962 and 1969 fee schedule reports by the State Bar. They also question the validity of State Bar Opinions 98 and 170 which in effect state that it is unethical for an attorney to habitually charge less than the fee called for in an established fee schedule. Plaintiffs contend that the fees charged for legal services incident to the purchase of a home in Northern Virginia have been raised, fixed and maintained at an artificial and noncompetitive level by the State Bar's activities. It is asserted that such activities are in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.[4]

The district court concluded that the State Bar had not violated the Sherman Act. The court held that the State Bar had acted within the scope of its statutory or rule created authority. Citing Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), in support of its determination that the State Bar was not liable under the Sherman Act, the district court stated:

> "The rationale behind the holding of Parker v. Brown, *supra*, that the Sherman Act restrains only actions of private persons and not state action, applies equally to both a state's judicial actions and its legislative actions."

Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 496 (E.D.Va.1973).

Prior to undertaking to apply the standards of the *Parker* exemption to the facts of this case we deem it advisable to consider the facts and holdings of Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), as well as those in Asheville Tobacco Board of Trade, Inc. v. F.T.C., 263 F.2d 502 (4 Cir. 1959), and Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248 (4 Cir. 1971).

In *Parker* a state agricultural proration program for the raisin industry was alleged to be in conflict with federal antitrust laws. Noting the significance of the raisin industry and agriculture in general to the economy of the State, the California Legislature passed the California Agricultural Prorate Act[5] to insure stability in the marketing of agricultural commodities produced in the State. Brown, a producer and packer of raisins, complained that the programs and policies initiated in response to the Prorate Act violated the Sherman Act. The Court held that the programs were permissible, even assuming the action would have been violative of the antitrust laws had the same plan been adopted by private individuals operating without a legislative mandate.

> "But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its *authority* and its *efficacy* from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."

Parker v. Brown, 317 U.S. 341, 350–351, 63 S.Ct. 307, 313, 87 L.Ed. 315 (1943) (accent added). The Court emphasized that the Sherman Act prohibited *individual* action and not *state* action. Applying this principle to the facts of *Parker*, the Court noted that it was the State which had created the machinery for establishing the prorate program. It was the State, acting through the Agricultural Prorate Advisory Commission,[6] which had adopted the

2. On the lighter side we note in passing that it appears that the Goldfarbs were actively seeking what might be termed "inexpensive assistance of counsel." This should not be confused with "ineffective assistance of counsel," a term often found in Habeas Corpus petitions. We do not find it necessary to consider whether, in any sense, these terms might bear some relationship, one to the other.

3. The opinion of the district court is reported at 355 F.Supp. 491 (E.D.Va.1973).

4. 15 U.S.C. § 1 provides, in part:
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

5. Act of June 5, 1933, ch. 754, Statutes of California of 1933, as amended by chs. 471 and 713, Statutes of 1935; ch. 6, Extra Session, 1938; chs. 363, 548 and 804, Statutes of 1939; and chs. 993, 1150 and 1186, Statutes of 1941.

6. The Commission consisted of nine members. The Director of Agriculture, a state official, was an *ex officio* member. The other eight members were appointed to four

program and enforced it with penal sanctions in the execution of a governmental policy.

[1] The *Parker* decision contains cautionary language directed at the states. A state cannot grant immunity to those who violate the Sherman Act by authorizing the violations, or by declaring that their action is lawful.[7] The question then arises: what factors are important in determining if state legislation creates a valid state action exemption or merely creates a shelter for immunity from the Sherman Act.

[2, 3] The *Parker* Court considered three factors in deciding that the California Agricultural Prorate Act was valid state action. First, the Court noted that the declared purpose of the Act was to conserve the agricultural wealth of the State and prevent its economic waste.[8] Thus, the Act was for the benefit of the public;[9] its purpose was not to give an unfair advantage or monopolistic position to producers and sellers. Secondly, the Court stressed that the regulation of the industry was actively and continually supervised by the State through its Commission.[10] Finally, the Court emphasized that the program received its authority and efficacy from the legislative command. The State conceived the theory of control and then created the machinery for the program.[11] The Act itself gave state officials the *power* to restrict competition among the growers and maintain certain price levels.[12] The satisfaction of these three factors is essential to establish and support a valid claim of the *Parker* exemption.

In Asheville Tobacco Board of Trade, Inc. v. F. T. C., 263 F.2d 502 (4 Cir. 1959), this court refused to apply the *Parker* exemption to local tobacco boards of trade. For many years tobacco boards of trade existed at common law in North Carolina by common consent or by contract among the interested individuals. The various boards exercised their power to promulgate regulations governing auction sales of tobacco. Finally the Legislature of North Carolina passed N.C.Gen.Stat. § 106–465[13] authorizing local tobacco boards of trade to make reasonable rules and regulations for the economic and efficient handling of the sale of leaf tobacco at auction. The Act did not authorize the control of prices or the making of rules and regulations in restraint of trade. The complained of activity concerned the Asheville Tobacco Board of Trade's regulations governing the allotment of selling time to warehouses.[14] The F.T.C. held that the regulations violated the intent and meaning of § 5 of the Federal Trade Commission Act.[15] On appeal the Asheville Board contended that its activities were exempt under the rationale of *Parker*. In refusing to apply the *Parker* exemption this court concluded that the regulations and activities were not state action but were individual activities subject to the jurisdiction of the F.T.C.

In both *Parker* and *Asheville* there was legislation concerning an industry important to the state and yet the courts reached opposite results. However, the cases are reconcilable. The key feature distinguishing the cases is North Carolina's failure to heed the cautionary language of *Parker*.[16] Keeping in mind the three factors helpful in determining whether state legislation creates a valid state action exemption or merely creates a shelter for immunity from the anti-trust laws, it is obvious from the facts of *Asheville* that the *Parker* exemption was not applicable. In *Parker* the declared purpose of the legislation was to conserve and economically use California's agricultural resources; the benefits of the Act accrued to the public. In *Asheville*, although the legislation involved an industry important to the State, the thrust of the Act concerned the self-regulation of auction procedures by warehousemen, sellers and buyers; that Act was not aimed at benefiting the public in any meaningful way. "A tobacco board of trade is organized primarily for the benefit of those engaged in the business . . . . ."[17] In *Parker* the regulation of the industry was actively supervised by state officials. N.C.Gen.Stat. § 106–465 did not provide for any supervision by a state agency or official. "They [the boards] are not accountable to the State, and are not supervised in any manner by State officials."[18] This court in *Asheville* noted that the only possible state involvement was the legislative act condoning the work of the boards and several court decisions involving disputes among members of the various boards. The court reasoned that this was not the active state supervision required by *Parker*. Finally, in *Parker* the program received its authority and efficacy from legislative command. In *Asheville* the

year terms by the Governor and confirmed by the State Senate. All members were required to take an oath of office.

7. "But such action must be state action, not individual action masquerading as state action." Asheville Tobacco Board of Trade, Inc. v. F.T.C., 263 F.2d 502, 509 (4 Cir. 1959).

8. Parker v. Brown, 317 U.S. 341, 346, 63 S. Ct. 307, 87 L.Ed. 315 (1943).

9. As a general proposition courts will not consider benefits flowing to the public when applying the Sherman Act to contracts, combinations or conspiracies among individuals. The decisions we have cited conclusively demonstrate that the prohibitions of the statute [Sherman Act] apply even though the parties to a contract indulge the belief that the agreement may have beneficial results and actually show that in some respects the public is benefited thereby. Congress has determined that the greater good is served by the maintenance of free competition and its decision in the field of interstate commerce must control.

Pennsylvania W. & P. Co. v. Consolidated G. E.L. & P. Co., 184 F.2d 552, 559 (4 Cir. 1950).

It is apparent from *Parker*, however, that courts should take cognizance of the benefits accruing to the public when a state is involved in the regulation of an industry.

10. Parker v. Brown, 317 U.S. 341, 352, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

11. *Id.* at 350 and 352.

It is interesting to note that it was not a case where individuals initially decided to take action, conspired to regulate competition and prices in the industry, and then received governmental approval through legislative action. On its surface such a sequence of events would appear to be an attempt by a state to grant immunity to those violating the Sherman Act. Indeed such "after the fact" legislation may create a rebuttable presumption that the state was attempting to camouflage individual action as state action.

12. *Id.* at 346.

13. N.C.Gen.Stat. § 106–465 provides in part:

Tobacco warehousemen and the purchasers of leaf tobacco, at auction, on warehouse floors, are hereby authorized to organize . . . tobacco boards of trade in the several towns and cities in North Carolina in which leaf tobacco is sold on warehouse floors, at auction.

Such tobacco boards of trade as may now exist, or which may hereafter be organized, are authorized to make reasonable rules and regulations for the economical and efficient handling of the sale of leaf tobacco at auction on the warehouse floors . . . .

. . . . . .

Nothing in this section shall authorize the organization of any association having for its purpose the control of prices or the making of rules and regulations in restraint of trade.

14. A warehouse owned by C. T. Day was handling twenty to twenty-five percent of the leaf tobacco sales in Asheville. Because of the Board's regulations, however, Day's warehouse was only allotted eight to nine percent of the total selling time. Both Day and the F.T.C. claimed the regulations were directly restraining his trade.

15. 15 U.S.C. § 45.

Although the *Asheville* case involved the Federal Trade Commission Act instead of the Sherman Act, the latter being the controlling statute in *Parker* and in the instant case, that fact had no bearing on the ultimate result. It appears that the exemption can be applied regardless of the specific antitrust law involved.

16. [A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . .

Parker v. Brown, 317 U.S. 341, 351, 63 S.Ct. 307, 314, 87 L.Ed.2d 315 (1943).

17. Asheville Tobacco Board of Trade, Inc. v. F.T.C., 263 F.2d 502, 509 (4 Cir. 1959).

18. *Id.* at 510.

regulations and controls on auction procedures were initially conceived and given effect by the interested individuals. Only at a later point in time did the Legislature approve such activities,[19] and even then the Act specifically denied the boards the power to restrict competition.[20] Viewing the cases in this light, *Asheville*, even though reaching a contrary result, bolsters our reading and understanding of *Parker*.

[4] One further point found in *Asheville* is helpful in any analysis of the *Parker* exemption. In *Asheville* the court held that:

> "It [the state] may even permit persons subject to such control to participate in the regulation, provided their activities are adequately supervised by independent state officials." [21]

Thus a legislature may grant to private individuals, the ones subject to control and regulation, the power to conduct the day to day operations of the program. Those individuals may even promulgate and enforce the regulations that control them, provided their activities are *adequately supervised by independent state officials*.

In Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248 (4 Cir. 1971), one issue was whether certain predatory promotional activities of Virginia Electric & Power Co. (VEPCO) were sufficiently regulated by a state agency, the State Corporation Commission (SCC), to qualify under the *Parker* exemption. Although the Virginia Legislature ultimately controls domestic public utilities,[22] the day to day regulation and control of that industry are conducted by SCC. VEPCO, through an agressive installation campaign, had made significant inroads into areas previously dominated by natural gas. Washington Gas Light Co. claimed these activities placed VEPCO in violation of the Sherman Act. On appeal VEPCO argued that the *Parker* exemption applied. The court discussed *Parker*, *Asheville* and other cases in concluding that the utility's activities regulated by SCC did fall within the exemption. The court noted that there was no doubt that SCC was an arm of the State, possessing both the authority and power to regulate through legislative command, and that requirement of *Parker* was thus met. It was also clear that regulation of giant utility concerns was for the protection of the public. The most difficult question, however, concerned the remaining cautionary factor of *Parker*: whether there was the sufficient state supervision.[23] Washington Gas Light Co. argued that SCC's inaction, its failure to give approval or disapproval of VEPCO's activities, made the actions of VEPCO those of an individual and not those of the State. The court responded:

> "The argument is not without merit but the conclusion is not inevitable unless one equates administrative silence with abandonment of administrative duty. It is just as sensible to infer that silence means consent, i. e., approval." [24]

Having discussed the *Parker* exemption at length we consider the facts of the case before us. The Legislature of Virginia has determined that the practice of law within the State should be controlled and regulated by the Virginia Supreme Court of Appeals (Virginia court). Virginia Code Ann. § 54–48

19. Such a sequence of events is in stark contrast to the facts of *Parker*. See note 11, *supra*. Although not specifically mentioned, the *Asheville* court appears to have inferred that such "after the fact" legislation was an attempt by the State to camouflage individual action as state action.

20. See note 13, *supra*.

21. 263 F.2d at 500.

22. Va.Code Ann. § 56-2 (Michie 1969 Replacement Volume).

23. Parker v. Brown, 317 U.S. 341, 352, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

24. Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248, 252 (4 Cir. 1971).

(Michie 1972 Replacement Volume), provides:

> "The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:
>
> (a) Defining the practice of law.
>
> (b) Prescribing a code of ethics governing the professional conduct of attorneys at law and a code of judicial ethics.
>
> (c) Prescribing procedure for disciplining, suspending, and disbarring attorneys at law."

The Legislature then established an administrative agency, presumably to relieve the Virginia Court of the day to day supervision and regulation of the legal profession. The State Bar is the administrative agency of the Virginia court. By enacting Va.Code Ann. § 54–49 (Michie 1972 Replacement Volume), the Legislature authorized the Virginia Court to "prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of the attorneys at law of this State, to act as an administrative agency of the Court . . . ." [25]

Paraphrasing, some of the pertinent stipulations of the parties here are as follows:

> The Virginia statutes have given the Virginia court authority to make questions involving suggested fee schedules and economic reports of the State Bar questions of ethics under the laws of Virginia.
>
> The Virginia court has stated that suggested fee schedules and economic reports of the State Bar involve questions of ethics and that the State Bar has the authority to issue opinions on such ethical matters.
>
> The State Bar has been given authority by the Virginia court to issue opinions similar to Opinions 98 and 170, which relate to minimum fee schedules, and to disseminate minimum fee schedule reports.

From the stipulations it is clear that the Legislature has made suggested fee schedules and economic reports a part of the regulatory power of the Virginia court and its administrative agency, the State Bar. Indeed, such matters have been regulated by issuance of two fee reports and Opinions 98 and 170.

In the instant case, as with *Parker* and *Asheville*, there is state legislation concerning an "industry" important to the state.[26] Thus, our initial concern is whether Virginia has heeded the cautionary language of Parker

The Virginia Legislature has provided for regulation of attorneys through a code of ethics governing professional conduct. That code's *primary* functions are to protect rights and interests of clients and to instill public confidence in the legal profession and our system of justice.[27] We would be less than candid

25. Va.Code Ann. § 54-49 (Michie 1972 Replacement Volume), also provides that the State Bar should be an integrated bar, i. e., all persons practicing law in the State are required to be members. § 54-50 allows the Virginia court to assess annual fees to practicing lawyers in the State. These fees are paid into the Virginia Treasury, credited to the State Bar Fund (§ 54-52) and used in administering the regulatory functions of the State Bar.

26. Both government and individuals rely on the legal profession for guidance in their daily transactions. The practice of law is essential to the smooth functioning of our socio-economic system, a system based on the theory of "rule by law." Indeed, a responsible legal "industry" is vital to Virginia and every state of the Union. The parties have not argued to the contrary.

27. It is apparent from a reading of the nine Canons that the Virginia Code of Professional Responsibility is primarily for the benefit of the public and especially for those members of the public who become clients of attorneys. The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationship with the public and the legal system. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules of the ethics code are derived.
(1) A lawyer should assist in maintaining the integrity and competence of the legal profession.

if we did not admit that lawyers, those who are regulated, benefit from certain provisions of the Code of Professional Responsibility. We cannot ignore the fact that in some instances adherence to a suggested minimum fee schedule is financially helpful to the individual attorney. Still, minimum fee schedules are only one factor among a multitude of variables that interrelate to provide the public with competent legal service.[28] It is probable that the raisin growers and sellers in *Parker* received some spin-off benefits from certain sections of the Agricultural Prorate Act. The point is that the regulation there was aimed primarily at benefiting the public. In *Asheville* the regulations involved were primarily for the benefit of those regulated; the public received little, if any, tangential benefits. It is clear that the desired goal of the Code of Professional Responsibility is to benefit clients and the public in general.[29] It is manifestly unfair to dissect a state's regulatory program into its various component parts, parts that were meant to interrelate, and then to declare that, because some factors may benefit those to be regulated, the program falls outside the *Parker* exemption.[30] Since the primary benefits of the regulation of lawyers accrue to the public, the first factor considered under the cautionary language of *Parker* has been satisfied here.

The second factor to be considered is whether there is *active* supervision by *independent* state officials. In *Parker* the supervising body was composed of the Director of Agriculture and eight members appointed by the Governor. They actively supervised the prorate program and the Court concluded that this factor had been satisfied. In *Asheville, supra*, the regulatory body was composed of members neither elected nor appointed; there were no independent state officials regulating the program and there was no active state supervision. In the instant case, the State Bar, which is designated by statute as the controlling state agency, is composed of those to be regulated.[31] It is doubtful that the State Bar, standing alone, could be viewed as the type of independent regulatory agency called for in *Parker*. This court in *Asheville* said that a state could allow those persons subject to controls to participate in the regulation, *provided* their activity is adequately supervised by independent state officials. Applying this proviso of *Asheville*, there is no question that the Judges of the Virginia court are sufficiently *independent*. Still, to meet this requirement of *Parker* the Virginia court must *actively* supervise the State Bar. It is stipulated that the Virginia court initially gave authority to the State Bar to issue suggested fee schedules and opinions similar to Opinions 98 and 170 concerning adherence to the schedules. The Virginia court also officially adopted the Code of Professional Responsibility. From time to time the Virginia court has employed suggested fee schedules in establishing attorney fees in cases before it. Finally, the Virginia court's inaction with regard to specifically approving or disapproving the schedules in question should not be construed as a failure to adequately supervise. Adopting and applying the logic found in *Washington Gas Light*, one should not equate silence with abandonment of the duty to supervise. "It is just as sensible to infer that silence means consent, i. e., approval."[32] The Virginia court has the authority to regulate and supervise the State Bar; we will not infer abandonment of that authority because of claimed inactivity. The active independent state supervision required in *Parker* is provided here by the Virginia court.

(2) A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available.
(3) A lawyer should assist in preventing the unauthorized practice of law.
(4) A lawyer should preserve the confidences and secrets of a client.
(5) A lawyer should exercise independent professional judgment on behalf of a client.
(6) A lawyer should represent a client competently.
(7) A lawyer should represent a client zealously within the bounds of the law.
(8) A lawyer should assist in improving the legal system.
(9) A lawyer should avoid even the appearance of professional impropriety.

For a detailed discussion of the Canons and more specifically the Ethical Considerations and Disciplinary Rules see Rules of the Supreme Court of Appeals of Virginia, Part 6, § I-II (as amended Jan. 1, 1971).

28. It is interesting to note what a minuscule part suggested fees play in the total scheme of regulation. The Virginia Code of Professional Responsibility is divided into nine major sections, each headed by one of the Canons listed in note 27, *supra*. Under each of the nine Canons there are Ethical Considerations (advisory in nature) and Disciplinary Rules (mandatory in nature). Concentrating on the Disciplinary Rules, those that attorneys must follow, we note that they are broken down further into various sections and subsections. To find reference to minimum fees in the Disciplinary Rules we must look to Canon 2. The Disciplinary Rules of that Canon have ten major divisions. (DR 2-101 to DR 2-110). DR 2-106 has three subdivisions. Under subdivision (B) there are eight separate sections. Section 3 refers to minimum or customary fees charged in the locality. Clearly minimum fees play but a small part in the total picture of regulation of the "industry." For a more detailed listing of the sections of DR 2-106 see note 30, *infra*.

29. Our conclusion that the ethics code primarily benefits the public is bolstered by the logic of the United States Supreme Court in Lathrop v. Donohue, 367 U.S. 820, 843, 81 S.Ct. 1826, 1838, 6 L.Ed.2d 1191 (1961).

> Both in purport and in practice the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably believe, of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State . . . . It cannot be denied that this is a legitimate end of state policy.

Additional support can be found in the case of Semler v. Oregon Bd. of Dental Examiners, 294 U.S. 608, 612, 55 S.Ct. 570, 572, 79 L.Ed. 1086 (1935).

> The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises . . . . And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the "ethics" of the profession is but the consensus of expert opinion as to the necessity of such standards.

30. Such a myopic view can be misleading. Although minimum fees may in some cases provide more than adequate compensation for services rendered, their appearance in DR 2-106 is for the purpose of establishing *reasonable* fees. The ethics code states that it is necessary to establish what is a reasonable fee to insure that clients are not charged an excessive fee. In part, the Virginia Code of Professional Responsibility DR 2-106 (Jan. 1, 1971), provides:

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
(3) *The fee customarily charged in the locality for similar legal services.*
(4) The amount involved and the results obtained.
(5) The time limitations imposed by the client or by the circumstances.
(6) The nature and length of the professional relationship with the client.
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
(8) Whether the fee is fixed or contingent. [Emphasis added.]

31. The State Bar is controlled by its Council, composed of six members appointed by the Supreme Court of Virginia, and the President, the immediate Past-President, and the President-Elect of the State Bar, as *ex officio* members; additional members of the Council, composing the bulk of the membership, are elected by lawyers from the judicial circuits of State.

32. Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248, 252 (4 Cir. 1971).

We have little difficulty in finding the presence of the third factor to be considered in light of the cautionary language of *Parker*. The parties have stipulated that the regulation program here received its authority and efficacy from legislative command. The Act involved gave the Virginia court the power to restrict competition among those in the legal profession. The Virginia Legislature created the machinery for regulation. Lawyers did not conceive and implement the plan and then seek "after the fact" legislative acceptance as was the case in *Asheville*.

[5] We find state action here concerning a business important to the State. From the foregoing analysis it is apparent that Virginia has heeded the cautionary language of *Parker*. Here we are not considering sham legislation granting immunity to those who violate the Sherman Act. The State Bar avoids liability under the Sherman Act because of the *Parker* exemption.

Part B—Fairfax County Bar Association

[6] The Fairfax County Bar Association is a voluntary organization composed of members of the State Bar practicing in Fairfax County, Virginia. The Association is a private organization and does not derive its authority or efficacy from the State. While it is clear that the State Bar recognizes local bar associations it does not regulate or supervise local bar activities.

Pursuant to the suggestion of the State Bar in its "Minimum Fee Schedule Report" the Fairfax County Bar Association published a "Minimum Fee Schedule." Although described as "voluntary" by the Association it is clear from the record that all or nearly all of the Association's members charged fees equal to or exceeding the fees set forth in the schedule for title examinations and other services involving real estate. The Association has no power to discipline violators but has clearly relied upon and reinforced the State Bar's threat to discipline habitual violators of locally established minimum fee schedules.

The district court held that the Association was in violation of the Sherman Act, 15 U.S.C. § 1. With respect to jurisdiction the court found that the real estate services provided by members of the Association sufficiently affected interstate commerce to warrant federal jurisdiction under the Sherman Act. The court specifically found that the Association was engaged in a form of price-fixing and that it was not exempt from prosecution under the *Parker* exemption or the "learned profession" exemption.

On appeal it has been argued by the Association that the *Parker* exemption should be extended to cover the Association's activities. Applying the three factors from the cautionary language of *Parker*, we note first that the Association has been engaged in the same basic activities as the State Bar. We have no doubt that the primary aim of those activities was to benefit the public just as it was the aim of the State Bar. However, the remaining cautionary requirements of *Parker* were not satisfied by the Association. The Fairfax County Bar Association's regulatory activities are not founded on a legislative command as are the activities of the State Bar. More fatal to the application of *Parker* to the Association is the fact that there is no active independent state supervision. The Virginia court has no direct control over local bar associations. Although the Virginia court could eventually pass judgment on local bar activities, the process might entail lengthy court proceedings. The active independent state supervision required in *Parker* to insure that abuses do not occur within a regulatory scheme would be absent. We decline to extend the *Parker* exemption to the Fairfax County Bar Association.

On appeal the Association also contends that the legal profession is a "learned profession," that it is not subject to the antitrust laws and that the activities complained of do not restrain

interstate trade. We find it necessary to consider the allegations of the Goldfarbs and the facts as found by the district court in some detail to resolve these issues on appeal.

The Goldfarbs contend that the Association by promulgation of the minimum fee schedule has restrained trade or commerce among the several states in violation of the Sherman Act. They allege (1) that the fee schedule restrains attorneys in the practice of their profession resulting in artificially high fees, and (2) that the fee schedule restrains those engaged in the financing and insuring of home mortgages by arbitrarily inflating a component part of the cost of securing housing. We discuss separately each of these alleged forms of restraint.

II. The "Learned Profession" Exemption

It is abundantly clear from the record before us that the fee schedule and the enforcement mechanism supporting it act as a substantial restraint upon competition among attorneys practicing in Fairfax County. The question before us, however, is whether this is a "restraint of trade or commerce among the several States" and therefore a violation of the Sherman Act.

Throughout the development of federal antitrust law there has been judicial recognition of a limited exclusion of "learned professions" from the scope of the antitrust laws. This exclusion is not a favor bestowed upon professionals by the courts as a "professional courtesy"; the exclusion arises from the language of the statutes and the peculiar nature of the services rendered.

[7, 8] The Sherman Act declares that every "restraint of trade or commerce among the several States" is illegal. Restraints upon the practice of law are not illegal *per se* because that which is restrained (*i. e.*, the practice of a "learned profession") is neither trade nor commerce. The "learned profession" exemption rests upon two cases decided by the United States Supreme Court. Those cases hold that one engaged in the practice of a profession "follow[s] a profession and not a trade" [33] and that such "personal effort, not related to production, is not a subject of commerce." [34] Even when the Supreme Court substantially expanded the scope of the Sherman Act by defining trade in its broadest sense, it recognized that the practice of a "learned profession" is not a trade.[35] While more recent decisions of the Supreme Court have refused to pass upon the validity of

33. Federal Trade Comm'n v. Raladam Co., 283 U.S. 643, 653, 51 S.Ct. 587, 592, 75 L.Ed. 1324 (1931) (construing the Federal Trade Commission Act, 15 U.S.C. § 45, with reference to the Sherman Act, 15 U.S.C. §§ 1-7, and the Clayton Act, 15 U.S.C. §§ 12 et seq.).

34. Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200, 209, 42 S.Ct. 465, 466, 66 L.Ed. 898 (1922); *see also* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 573, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944) (dissenting opinion of Chief Justice Stone).

35. Mr. Justice Sutherland in construing the phrase "restraint of trade" as it appears in § 3 of the Sherman Act quoted with approval the following statement of Mr. Justice Story in The Schooner Nymph, 18 F.Cas. p. 506 (No. 10,388):

> "The argument for the claimant insists, that 'trade' is here used in its most restrictive sense, and as equivalent to traffic in goods, or buying and selling in commerce or exchange. But I am clearly of opinion, that such is not the true sense of the word, as used in the 32d section. In the first place, the word 'trade' is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a *trade*."

Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 436, 52 S.Ct. 607, 610, 76 L.Ed. 1204 (1932). While that case was decided under Section 3 of the Sherman Act and the allegations in the instant case relate to Section 1, we see no reason to assign a different meaning to the word "trade" as it appears in Section 1.

the "learned profession" exemption,[36] we find nothing to suggest that it should not continue to be applied in appropriate cases. Lower federal courts have continued to recognize and apply this exemption.[37]

[9, 10] It is not difficult to understand why the learned professions have been treated differently than other occupations by the courts with respect to the antitrust laws. As Justice Jackson, speaking for the Court in United States v. Oregon State Medical Society, 343 U. S. 326, 336, 72 S.Ct. 690, 697, 96 L.Ed. 978 (1952), said, "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession." The legal profession has rejected the maxim of *caveat emptor* as a standard of conduct.[38] Unlike the mechanic or the butcher, a lawyer has a professional duty to provide his services at a reduced rate to those who need but cannot afford his services.[39] Advertising and other forms of solicitation of business common to trade and commerce are criminal acts when utilized by lawyers.[40] In view of the special form of regulation already imposed upon those in the legal profession the courts have been reluctant to superimpose upon the profession the sanctions of the antitrust laws, many of which are in direct contravention of existing legal and ethical restrictions.[41]

[11] We believe that much of the criticism of this "learned profession" exemption is the result of a misunderstanding of its nature and extent. The exemption is not a personal immunity from prosecution, but is rather a recognition that the Sherman Act prohibits only those restraints which are upon trade or commerce. The occupation of one who violates the Sherman Act is irrelevant. If a group of doctors conspire to obstruct the interstate sale of health insurance their professional status would be no defense.[42] On the other hand, if a group of doctors conspire to restrain the practice of another doctor there is no Sherman Act violation because that which is restrained (*i. e.*, the practice of a learned profession, medicine) is neither trade nor commerce.[43] With that distinction in mind, it should be clearly discernible that the impact of the Association's fee schedule in the instant case upon competition among attorneys for real estate work is not within the scope of the Sherman Act.

We do not intend to suggest that any learned profession is above the law. The "learned profession" exemption is a defense to a Sherman Act violation only where the restraint is upon the learned profession itself. That exemption is applicable only to those matters with respect to which an accord must be reached between the necessities of professional regulation and the dictates of the antitrust laws. We therefore conclude that the promulgation of a fee schedule has a sufficient part in the overall scheme devised by the State of Virginia to regulate the legal profession to claim the form of limited immunity to antitrust prosecution available under the "learned profession" exemption. Thus, fee schedules are valid insofar as the effect is to restrain competition among attorneys.

III. Interstate Commerce

We next turn our attention to the allegation that the fee schedule restrains those engaged in the financing and insuring of home mortgages by inflating a component part of the cost of securing housing. Since that which is allegedly restrained is not a learned profession, the "learned profession" exemption does not apply here. There is, of course, no allegation that the attorneys conspired for the express purpose of restraining the trade or commerce of those engaged in the real estate industry. However, even if the objects of conspirators were to restrain activities not protected by the Sherman Act, "they must take their victims' involvement in interstate commerce as they find them." Lehrman v. Gulf Oil Corporation, 464 F.2d 26, 36 (5 Cir. 1972). Thus, the fee schedule "may come within the purview of federal antitrust jurisdiction if the requisite effect on interstate commerce is shown." Brett v. First Federal Savings & Loan Association, 461 F.2d 1155, 1157 (5 Cir. 1972).

[12] Under the Sherman Act it is essential that the alleged restraint of trade or commerce be shown to affect *interstate* commerce. This requirement is jurisdictional under both the Constitution[44] and the Sherman Act.[45] In examining the question of whether the Association's activities constitute a restraint of *interstate* trade for jurisdic-

36. American Medical Ass'n v. United States, 317 U.S. 519, 528, 63 S.Ct. 326, 328, 87 L.Ed. 434 (1943) ("Much argument has been addressed to the question whether a physician's practice of his profession constitutes trade under § 3 of the Sherman Act. . . . [W]e need not consider or decide this question."); United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 491–492, 70 S.Ct. 711, 715, 94 L.Ed. 1007 (1950) ("we do not intimate an opinion on the correctness of the application of the term [trade] to the professions.").

37. Riggall v. Washington County Medical Soc'y, 249 F.2d 206, 208 (8 Cir. 1957); Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc., 139 U.S.App.D.C. 217, 432 F.2d 650, 654 (1970).

38. A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

Canon 5, Virginia Code of Professional Responsibility, DR 5-104(A).

A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

Canon 2, Virginia Code of Professional Responsibility, DR 2-106(A).

39. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . . Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged.

Canon 2, Virginia Code of Professional Responsibility, EC 2-25.

It is customary in many jurisdictions to appoint lawyers for indigent criminal defendants by selecting lawyers at random from those practicing before the court. Agreement to accept such employment at the statutory rate, even if less than the schedule fee or the appointed attorney's customary fee, is often a condition of admission to practice before the court.

40. The common law crimes of barratry, maintenance, and champerty are recognized in Virginia and have been codified in Code of Virginia §§ 18.1-388 through 18.1-399 (Michie 1960 Replacement Volume). Although the statutory provisions relating to maintenance and champerty were declared unconstitutional in National Ass'n for the Advancement of Colored People v. Harrison, 202 Va. 142, 116 S.E.2d 55 (1960), the court made it clear that maintenance and champerty continue to be illegal under Code of Virginia §§ 54-74, 54-78, and 54-79 (Michie 1972 Replacement Volume), insofar as solicitation is involved.

41. [T]he proscriptions of the Sherman Act were 'tailored . . . for the business world,' not for the noncommercial aspects of the liberal arts and the learned professions.

Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc., 139 U.S.App.D.C. 217, 432 F.2d 650, 654 (1970) (footnotes omitted), cert. denied, 400 U.S. 965, 91 S.Ct. 367, 27 L.Ed.2d 384 (1970); *see also* Greene v. Howard Univ., 134 U.S.App.D.C. 81, 412 F.2d 1128, 1133 (1969).

42. American Medical Ass'n v. United States, 317 U.S. 519, 63 S.Ct. 326, 87 L.Ed. 434 (1943). The Court declined to resolve the question of whether the practice of medicine was a "trade" within the meaning of the Sherman Act. What the Court held was that the sale of health insurance was interstate trade and that a conspiracy among doctors to restrict it violated the Sherman Act.

43. Riggall v. Washington County Medical Soc'y, 249 F.2d 206 (8 Cir. 1957).

44. Article 1, section 8, clause 3, of the Constitution of the United States vests Congress with the power "[t]o regulate Commerce with foreign Nations, and among the several States . . . ." Pursuant to that broad grant of power Congress has enacted the Sherman Antitrust Act, 15 U.S.C. §§ 1-7.

45. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .
15 U.S.C. § 1.

tional purposes, we are guided by cases construing both the commerce clause and the Sherman Act.[45]

[13, 14] It is undisputed that the activities of the Association and its members were carried on wholly within the State of Virginia. Therefore, jurisdiction will exist only if the actions complained of are shown to have a "direct and substantial" effect upon interstate commerce. Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co., 469 F.2d 416, 418 (5 Cir. 1972); United States v. Bensinger Co., 430 F.2d 584, 588 (8 Cir. 1970). No satisfactory formula has yet been fashioned which would encompass the myriad of factors to be considered in determining whether the effect upon interstate commerce is "direct and substantial." However, since it is a mixed question of law and fact which relates to jurisdiction, we are compelled on appeal to fully examine the conclusion of the district court. In doing so we are ever mindful of the deference to be accorded the lower court's findings on questions of fact.

From the findings of fact set forth in the following passage, the district court concluded that jurisdiction did exist:

> "[A] significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia. All or nearly all of the lenders making such loans require, as a condition of making the loan, that the title to the property involved be examined and that title insurance be furnished and paid for by the home buyer-mortgagor. This alone warrants the conclusion that interstate commerce is sufficiently affected to sustain jurisdiction under the Sherman Act. There is also uncontradicted evidence that a large percentage of persons who live in Fairfax County work outside of Virginia and that significant amounts of loans on Fairfax County real estate are guaranteed by the United States Veterans Administration and Department of Housing and Urban Development, both headquartered in the District of Columbia. The fees charged for the title examination and insurance just mentioned are covered by the minimum fee schedule here in question." [47]

After an extensive examination of the case law and upon careful consideration of the facts enumerated above we are left with the firm conviction that the activities of the Association did not have a direct and substantial effect upon *interstate* commerce and that jurisdictional requirements are not met.

[15, 16] First, the finding by the district court that many of the residents of Fairfax County, including the Goldfarbs, work outside of Virginia is totally irrelevant. The fact that a service may be utilized by one coincidentally engaged in interstate travel will not establish jurisdiction under the Sherman Act.[48] This is true even where one crosses state lines for the sole purpose of purchasing the service.[49] The interstate commerce which is allegedly affected by the fee schedule is the financing of home mortgages; the fact that the mortgagor commutes across state lines to his job is of no interest to the mortgagee or to this court.

[17] If jurisdiction exists in this case, it must be based upon the district court's finding that a title examination was required by out-of-state lenders and guarantors who were involved in a "significant" portion of the home purchases in Fairfax County. For that finding to be a basis for jurisdiction, it must be shown that the minimum fee arrangement with respect to real estate services had the requisite effect upon the interstate financing and insuring of home mortgages. The fact that a service is occasionally utilized to facilitate interstate activities does not subject the one providing that service to the proscriptions of the Sherman Act. United States v. Yellow Cab Co., 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947); Evanston Cab Co. v. Chicago, 325 F.2d 907 (7 Cir. 1963). Mere involvement with some facet of interstate commerce has never been sufficient to support jurisdiction under the Sherman Act.[50] To support jurisdiction the involvement must be direct and substantial.[51]

[18, 19] In considering whether a particular activity has a direct and substantial effect upon interstate commerce the essence or nature of the activity is a factor to be considered. *See* Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341, 343 (9 Cir. 1969); Lawson v. Woodmere, Inc., 217 F.2d 148, 151 (4 Cir. 1954). Previously, the practice of law has been considered an intrastate activity. *See* Mutual Life Insurance Co. v. Liebing, 259 U.S. 209, 42 S.Ct. 467, 66 L.Ed. 900 (1922) (dictum). Some aspects of the practice of law are uniquely intrastate.[52] The act of the borrower in securing purchase-money from an out-of-state lender makes neither the selling of the house[53] nor the supplying of incidental legal services an interstate activity. "That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it." Wickard v. Filburn, 317 U.S. 111, 124, 63 S.Ct. 82, 39, 87 L.Ed. 122 (1942).

46. In enacting the Sherman Act "Congress exercised 'all the power it possessed.'" Apex Hosiery Co. v. Leader, 310 U.S. 469, 495, 60 S.Ct. 982, 993, 84 L.Ed. 1311 (1940). Thus, in construing the jurisdictional provisions of the Act we look to the commerce clause for guidance. United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 297-298, 65 S.Ct. 661, 89 L.Ed. 951 (1945).

47. 333 F.Supp. at 494.

48. Hotel Phillips, Inc. v. Journeymen Barbers, Hairdressers, Cosmetologists & Proprietors Int'l Union of Amer., 195 F.Supp. 664 (W.D.Mo.1961).

49. The fact that some of plaintiff's patients might travel in interstate commerce does not alter the local character of plaintiff's hospital. If the converse were true, every country store that obtains its goods from or serves customers residing outside the state would be selling in interstate commerce. Uniformly, the courts have held to the contrary.
Elizabeth Hospital, Inc. v. Richardson, 269 F.2d 167, 170 (8 Cir. 1959); *accord*, Spears Free Clinic & Hospital For Poor Children v. Cleere, 197 F.2d 125 (10 Cir. 1952); Kallen v. Nexus Corp., 353 F.Supp. 33 (N.D.Ill. 1973).

50. Neither the facts in this case nor any other authority known, supports the theory here advanced, namely, that local activities are illegal under the Sherman Act because they concern persons who have previously moved in interstate commerce or who, after receiving a local personal service, may thereafter move in interstate commerce.
Hotel Phillips, Inc. v. Journeymen Barbers, Hairdressers, Cosmetologists & Proprietors Int'l Union of Amer., 195 F.Supp. 664, 669 (W.D.Mo.1961).
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed. 2d 258 (1964), is not to the contrary, for there the plaintiff was utilizing a service in the course of his interstate travel and that service was shown to be dedicated to and an integral part of the interstate transportation of persons.

51. However, despite the increased thrust of federal commerce power as business operations become more interrelated and complex, the courts have consistently required that in order for federal antitrust jurisdiction to be sustained the effect on interstate commerce of an alleged antitrust violation in a local area must be direct and substantial, and not merely inconsequential, remote or fortuitous.
Page v. Work, 290 F.2d 323, 332 (9 Cir. 1961), cert. denied 368 U.S. 875, 82 S.Ct. 121, 7 L.Ed.2d 76 (1961).

52. We can find no logic which would support the position that the defense of a state criminal prosecution, or the trial of a divorce case would fall within the scope of interstate commerce. These activities are covered by the minimum fee schedule and the plaintiffs insist on appeal that we consider the entire fee schedule as an integral unit. We agree that the schedule is an integral unit and that real estate services are not the type of unique services whose exclusive dedication to interstate commerce requires separate consideration. *See* United States v. Yellow Cab Co., 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947).

53. *Cf.* Marston v. Ann Arbor Property Managers (Management) Ass'n, 422 F.2d 836 (6 Cir. 1970). The Sixth Circuit in *Marston* affirmed the holding by the district judge that the rental of real estate in the Ann Arbor area "is local commerce" and that the competition restrained by the alleged price fixing agreement "is local in nature." Hence the action was dismissed for failure to sufficiently plead jurisdiction essential to a Sherman Act case.

[20] An activity which is part of a "general local service" is less likely to be subject to the Sherman Act than is an activity which constitutes an "integral part" of interstate commerce. United States v. Yellow Cab Co., 332 U.S. 218, 233, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947). The evidence in the record in this case demonstrates that the members of the Association were engaged in the general practice of law and did not solicit out-of-state business. It is merely a fortuitous circumstance that the Goldfarbs, who were residents of Virginia, intended to utilize these legal services to secure a loan from a company engaged in interstate transactions. Where the impact of the disputed trade practice upon interstate commerce is "merely incidental to defendants' local activities" no jurisdiction exists under the Sherman Act. Kallen v. Nexus Corporation, 353 F. Supp. 33, 36 (N.D.Ill.1973). We are constrained to hold that the Association sought to regulate only "general local services." The fact that those services are occasionally used by persons who are simultaneously engaged in an ancillary interstate transaction to facilitate the conduct of that transaction is merely "incidental"; this does not justify federal regulation of competitive restraints upon a business which is "wholly local" in character. Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341, 343 (9 Cir. 1969).[34]

Plaintiffs have drawn our attention to numerous cases which have adopted expansive concepts of federal power and argue by analogy that the impact of the alleged restraint upon interstate commerce is no more remote here than in those cases. We have previously analyzed many of those cases in Lawson v. Woodmere, Inc., 217 F.2d 148 (4 Cir. 1954), and in Savon Gas Stations Number Six, Inc. v. Shell Oil Co., 309 F.2d 306 (4 Cir. 1962), and will not repeat what we said there. We do, however, find it persuasive that no case has been called to our attention or disclosed by our independent research where an attempt to regulate those who provide a local service which is not dedicated to interstate commerce was held subject to the Sherman Act because of the fortuitous circumstance that the consumer or recipient of that service utilized it in the course of transacting interstate business.[35] The line has been drawn far short of this.[36] We decline the invitation to announce a doctrine which

34. We recognize that our conclusion that no federal jurisdiction exists with respect to the Association under the Sherman Act *may* also apply to the State Bar. However, since the district court has found, upon a valid ground, that the State Bar is not liable we have chosen to affirm the decision of the court in that respect for the reasons cited by it.

35. [T]here is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states. . . . [T]his Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce."

United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 297, 65 S.Ct. 661, 663, 89 L.Ed. 951 (1945).

36. We do not pretend to state precisely where that line has been drawn. Lawson v. Woodmere, Inc., 217 F.2d 148 (4 Cir. 1954), is the leading case in this Circuit as to what constitutes a direct and substantial burden on interstate commerce. Although analogies in such matters are seldom helpful we find the remoteness in the instant case far greater than that in *Lawson* where this court found that no jurisdiction existed.

With respect to the remoteness issue, this case can be compared to Gordon v. Illinois Bell Telephone Co., 339 F.2d 103 (7 Cir. 1964). There the plaintiff was engaged in the business of providing a telephone answering service for businesses, many of which were engaged in interstate commerce. The defendant, a local telephone company, allegedly discontinued a particular switchboard operation to drive the plaintiff out of business. Plaintiff brought an action for treble damages under the Sherman Act. In affirming dismissal of the action on appeal the court said the fact that "a few of plaintiffs' customers are engaged in interstate commerce is too unrelated a factor to impress plaintiffs' operation with an interstate character within the meaning and ambit of the Sherman Act." *Id.* at 106.

would sweep away the concept of remoteness, a concept which has historically limited federal power over commerce.

IV. Judicial Legislation

In recent times an unusually large number of noteworthy articles have appeared in legal periodicals discussing the merits and demerits of minimum fee schedules.[37] Those articles undertake to demonstrate that better methods are available to secure the objectives sought by minimum fee schedules; indeed, they have served to call to our attention logical and persuasive reasons for abandoning fee schedules. We do not doubt that they present cogent arguments for consideration by a legislature or bar association. However, we do not find such considerations controlling in a judicial setting. "These, plainly, are questions as to the policy of legislation which belong to another department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy." Northern Securities Co. v. United States, 193 U.S. 197, 352, 24 S.Ct. 436, 463, 48 L.Ed. 670 (1904); quoted with approval in United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 at 562, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944).

[21] We sit as a court of law. The question before us is whether the defendants' fee schedule system restrains trade or commerce in violation of the Sherman Act. While some of the cases cited and discussed herein demonstrate that traditionally the Sherman Act was not believed to cover the activities involved here, the Goldfarbs urge us to depart from that line of cases. They insist that we look to economic realities and adapt the broad language of the Sherman Act to the evolution of modern commercial practice. The answer to that is "it is not for the courts to indulge in the business of policy-making in the field of antitrust legislation." United States v. Cooper Corporation, 312 U.S. 600, 606, 61 S.Ct. 742, 744, 85 L.Ed. 1071 (1941). The Goldfarbs also ignore the restrictions of the commerce clause which are not to be disregarded by this court.

In effect, what the Goldfarbs urge upon us is judicial legislation. This is an area in which such legislation would be most inappropriate. To hold that the practice of law is subject to the Sherman Act would cast doubt upon the validity of bar admission standards, prohibitions upon advertising, and a multitude of other restrictions upon the practice of law. In our governmental system a legislative body is better equipped to accommodate these restrictions imposed upon the practice of a profession to the overall design and purpose of the antitrust laws.

Furthermore, antitrust laws are *punitive* as well as remedial. Any action on this subject matter by a legislative body will clearly be prospective. The ramifications of a judicially initiated extension of the coverage of the Sherman Act is less certain. The potential of the retroactive application of such a judicial extension coupled with the doubt it would cast upon the continuing viability of other ethical restrictions would create confusion in a profession where order is essential.

Our concern over retroactive application of this punitive statute does not end there. Even the most astute lawyer who

37. *E. g.*, Arnould & Corley, Fee Schedules Should be Abolished, 57 A.B.A.J. 655 (1971); Morgan, Where Do We Go from Here with Fee Schedules, 59 A.B.A.J. 1403 (1973); Minimum Fee Schedules as Price Fixing: A Per Se Violation of The Sherman Act, 22 Am.Univ.L.Rev. 439 (1973); The Antitrust Division v. The Professions—"No Hobbling" Clauses And Fee Schedules, 48 Notre Dame Lawyer 966 (1973); The Wisconsin Minimum Fee Schedule: A Problem of Antitrust, 1968 Wisc.L.Rev. 1237 (1968); *see also* The Learned Professions, 33 A.B.A. Antitrust L.J. 48.

could foresee judicial legislation extending the coverage of the Sherman Act to his profession would have been on the horns of a dilemma: if he followed the minimum fee schedule he *could* be violating the Sherman Act; if he did *not* follow it he *would* be in violation of the Virginia Code of Professional Responsibility. It would be an illusory choice since either action might result in punishment. The law does not compel this harsh result.

For the reasons stated we conclude that neither the Virginia State Bar nor the Fairfax County Bar Association has violated the Sherman Antitrust Act. The judgment of the district court is affirmed with respect to the Virginia State Bar and is reversed and vacated with respect to the Fairfax County Bar Association.

Affirmed as to No. 73-1247; reversed as to No. 73-1248.

CRAVEN, Circuit Judge (concurring and dissenting):

I would affirm the judgment of the district court both in holding the Fairfax County Bar Association liable for violating section 1 of the Sherman Act, 15 U.S.C. § 1, and in exonerating the Virginia State Bar. Thus I concur in the result the majority reaches as to the State Bar, and dissent as to Fairfax County Bar Association.

I take it, as I read the majority opinion, that we all agree that Judge Bryan correctly stated the rule of the Sherman Act, were it to govern this case.

> Minimum fee schedules are a form of price fixing and therefore inconsistent with antitrust statutes prohibiting anti-competitive activities.
>
> "Price fixing is per se an unreasonable restraint of trade. It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end. An agreement, shown either by adherence to a price schedule or by proof of consensual action fixing the uniform or minimum price, is itself illegal under the Sherman Act, no matter what end it was designed to serve." United States v. Real Estate Boards, 339 U.S. 485, 489, 70 S.Ct. 711, 714, 94 L.Ed. 1007 (1950).

355 F.Supp. at 493. The majority has concluded, however, that the Sherman Act applies to neither the State Bar nor Fairfax.

They say that the Virginia State Bar may lawfully fix prices for legal services —not because it is a sufficiently independent regulatory agency to come within the *Parker* exemption [1]—but because it is "actively supervised" by the Supreme Court of Virginia. Majority opinion at 11. In so holding, the majority relies upon a stipulation that was not adopted by the district judge:

> 16. The Virginia Statutes have given the Supreme Court of Virginia authority to make questions involving suggested fee schedules and economic reports of the State Bar and of Local Bar Associations questions of ethics under the laws of Virginia.

In refusing the stipulation, the district court expressly noted that it was a conclusion of law rather than a fact. 355 F.Supp. at 492 n. 2.[2] He also intimated

1. Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

2. The statute that is claimed to give the Supreme Court authority to prescribe fee schedules does not mention fees at all.

> The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:
>
> (a) Defining the practice of law.
>
> (b) Prescribing a code of ethics governing the professional conduct of attorneys-at-law including the practice of law or patent law through professional law corporations, professional associations and partnerships, and a code of judicial ethics.
>
> (c) Prescribing procedure for disciplining, suspending, and disbarring attorneys-at-law.
>
> Va.Code § 54-48 (as amended 1973).
>
> The court's authority is further circumscribed by § 54-51:
>
> Notwithstanding the foregoing provisions of this article, the Supreme Court of Appeals shall not adopt or promulgate rules or regulations prescribing a code of ethics governing the professional conduct of attorneys at law, which shall be inconsistent with any statute . . . .
>
> Va.Code § 54-51.

that he had some difficulty seeing what, if anything, a minimum fee schedule has to do with ethics. *Id.* at 496 n. 4. These questions and others like them can best be left to the Supreme Court of Virginia. Whatever that court may think of the power claimed for it to equate price fixing with legal ethics, I think it will be surprised to learn that it is engaged in *active* supervision of the State Bar's implementation of minimum fee schedules in Virginia. I find nothing in the record to suggest that the Virginia court even knew that Fairfax County Bar Association had a minimum fee schedule, or that it approved it either directly or indirectly through the State Bar.

I would exonerate the State Bar not because it falls within the *Parker* exemption but for the second reason advanced by the district judge: the exceedingly "minor role" of the State Bar in this matter. He found that the State Bar did not promulgate the minimum fee schedule, did not endorse or approve it, never undertook to discipline any attorney for violating it, and never contemplated any such action. All the State Bar ever did, apparently, was to suggest that local associations might wish to adopt a minimum fee schedule and to circulate reports on the schedules that local bar associations had adopted. Such minimal participation seems to me insufficient to impose Sherman Act liability upon the State Bar. *See* United States v. National Ass'n of Real Estate Boards, 339 U.S. 485, 494-496, 70 S.Ct. 711, 94 L.Ed. 1007 (1950).

As to Fairfax County Bar Association, I am in complete agreement with the majority that the local association cannot and does not qualify for the *Parker* exemption. Nevertheless they exonerate Fairfax on two grounds: (1) that the practice of law is a learned profession rather than a trade or business, and that lawyers are thus exempt from the Sherman Act's prohibition of price fixing; and (2) that the practice of law in Fairfax County, and more especially the investigation and certification of land titles in that county, do not sufficiently affect interstate commerce to invoke the Sherman Act.

If the majority is correct that interstate commerce is not sufficiently affected, that is the end of the matter and there is no occasion or necessity to apply the *Parker* exemption to exonerate the State Bar and the so-called learned profession exemption to exonerate Fairfax. I believe, however, that Fairfax County minimum fees have a sufficient impact on interstate commerce. The applicable standard was stated succinctly in Burke v. Ford, 389 U.S. 320, 88 S.Ct. 443, 19 L.Ed.2d 554 (1967):

> [I]t is well established that an activity which does not itself occur *in* interstate commerce comes within the scope of the Sherman Act if it substantially *affects* interstate commerce.

Id. at 321 (emphasis in original).

The district court found as a fact that a significant portion of funds furnished for the purchasing of homes in Fairfax County comes from outside the State of Virginia. His finding is supported by substantial evidence. One sample taken from the Office of Recorder of Deeds of Fairfax County indicated that $75,000,000 out of $136,000,000 loaned for mortgages was loaned by persons or corporations residing outside or incorporated outside of Virginia. During 1968-72 more than $570,000,000 of loans was either guaranteed by the United States Veterans Administration or insured by the United States Department of Housing and Urban Development, both of which are headquartered in the District of Columbia. In addition to the interstate commerce in loans, there was evidence tending to show substantial interstate movement and travel of persons into northern Virginia. Indeed, the evi-

dence tended to show that more than 30 percent of the population of Arlington County, Fairfax County, and the city of Alexandria in 1970 had come from areas outside Virginia since the year 1965. The district judge accepted "uncontradicted evidence" that a large percentage of persons who live in Fairfax County work outside of Virginia. We may judicially notice, I think, that Fairfax County is one of Washington's bedrooms. The cumulation of these facts persuades me that housing in Fairfax County is a commodity offered for sale in interstate commerce. It cannot realistically be considered a purely local market.

The evidence also demonstrates that the minimum fee schedules affect the cost of housing in Fairfax County. The district court found that all or nearly all money lenders require title examination and title insurance. Title search fees thus become a part of the cost of housing. The price that thousands of employees in the District of Columbia have to pay for housing in Fairfax County, Virginia, has, it seems to me, a direct, immediate, and substantial effect on interstate commerce. It is irrelevant that the restraint occurs only in Fairfax County. I would have thought it beyond question that the Sherman Act encompasses local restraints that directly affect the cost of a commodity offered for sale in interstate commerce. This was the thrust of the holding in Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948), where the Court said:

> [T]he inquiry whether the restraint occurs in one phase or other, interstate or intrastate, of the total economic process is now merely a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented.

Id. at 234. In United States v. Women's Sportswear Manufacturers Ass'n, 336 U.S. 460, 464, 69 S.Ct. 714, 1005, 93 L. Ed. 805 (1949), Mr. Justice Jackson, writing for the Court, stated:

> The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

I believe the district court's findings of fact are not clearly erroneous and compel the conclusion that an agreement to fix fees that infect the cost of housing in Fairfax County has a sufficient impact on interstate commerce to come within the Sherman Act. The Supreme Court has said that "Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.'" United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 298, 65 S.Ct. 661, 664, 89 L.Ed. 951 (1945). I believe it is much too late to dismiss as "expansive concepts of federal power" an interpretation of the commerce clause that would embrace the fee schedules involved here. Since the modern era of the commerce clause began in 1937 with NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed.2d 893 (1937),[3] the Supreme Court has consistently approved congressional regulation of local activities that have a potential for affecting interstate commerce.[4] Our

3. The 1937 change of direction was so significant that casebooks now divide study of the commerce power into two parts: before and after 1937. *See, e. g.*, G. Gunther & N. Dowling, Constitutional Law § 5: "The Commerce Power Since 1937—Constitutional Revolution or Continuity?" (8th ed. 1970); W. Lockhart, Y. Kamisar & J. Choper, Constitutional Law § 3: "Evolution of National Power Over National Economic Problems: I. Limitations on Federal Power Through 1936: II. Expansion of Federal Power After 1936" (3d ed. 1970).

4. The recent history of the commerce clause is surveyed in Perez v. United States, 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971).

interpretation of the Sherman Act should keep pace with these decisions. *See* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 557, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944).

Nor can I accede to the view that the legal profession is exempt from the Sherman Act. The majority states that two cases decided by the United States Supreme Court hold "that one engaged in the practice of a profession 'follow[s] a profession and not a trade.'" Majority opinion at 13. They are mistaken. The Supreme Court has never so held and indeed has refused to "intimate an opinion on the correctness of the application of the term [trade] to the professions." United States v. National Ass'n of Real Estate Boards, 339 U.S. 485, 491–492, 70 S.Ct. 711, 715, 94 L.Ed. 1007 (1950); American Medical Ass'n v. United States, 317 U.S. 519, 528, 63 S.Ct. 326, 87 L.Ed. 434 (1943). Nor has any inferior federal court ever so held.[5] Nothing supports the so-called "learned profession" exemption except dicta from cases decided in an era of judicial antagonism to governmental regulation of business and commerce. FTC v. Raladam Co., 283 U.S. 643, 51 S.Ct. 587, 75 L.Ed. 1324 (1931), involved the Federal Trade Commission's efforts to regulate the manufacturer and seller of an obesity cure. It had nothing to do with any learned profession, but Mr. Justice Sutherland included in his opinion the dictum that medical practitioners "follow a profession and not a trade . . . ." *Id.* at 653.

The other case said to be the source of the "learned profession" exemption is Federal Baseball Club v. National League of Professional Baseball Clubs, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898 (1922). In the course of deciding that the Sherman Act did not apply to organized baseball, Mr. Justice Holmes found occasion to state that not only is baseball not "trade or commerce in the commonly accepted use of those words," but that any "personal effort, not related to production, is not a subject of commerce."[6] He then repeated illustrations given by the court below:

> [A] firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State.

Id. at 209.

The last and final support for the so-called "learned profession" exemption is found in a 1932 opinion by Mr. Justice Sutherland who quotes with approval from an opinion by Mr. Justice Story, as set out in the majority opinion at footnote 35. Not only was the reference to learned professions irrelevant to the decision in the case, but it is clear from the context that Justice Story's language was used to broaden rather than constrict the definition of the word "trade."

5. The opinion that medicine was not a trade was the basis for the district court decision in the AMA case, but the court of appeals reversed on the issue, and the Supreme Court avoided it on the second appeal of the case. United States v. American Medical Ass'n, 28 F.Supp. 752 (D.D.C.1939), rev'd, 72 App.D.C. 12, 110 F.2d 703, cert. denied 310 U.S. 644, 60 S.Ct. 1006, 84 L.Ed. 1411 (1940); United States v. American Medical Ass'n, 317 U.S. 519, 63 S.Ct. 326, 87 L.Ed. 434 (1943). The only other holding that even remotely resembles a "learned profession" exemption is Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc., 139 U.S. App.D.C. 217, 432 F.2d 650, cert. denied, 400 U.S. 965, 91 S.Ct. 367, 27 L.Ed.2d 384 (1970), and the court there was careful to note that it was not creating a wide-ranging exemption for college accreditation associations. Riggall v. Washington County Medical Society, 249 F.2d 266 (8th Cir. 1957), included a statement that the practice of medicine is neither trade nor commerce, but the decision of the court rested on several other grounds, including the absence of any connection with interstate commerce and the failure to allege monopolization or injury to the public.

6. 259 U.S. at 209. This broad declaration has been rejected by subsequent cases that have applied the Sherman Act to personal services. *See* United States v. National Ass'n of Real Estate Boards, 339 U.S. 485, 489–492, 70 S.Ct. 711, 94 L.Ed. 1007 (1950).

Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 52 S.Ct. 607, 76 L.Ed. 1204 (1932).

Upon these three dicta the majority erect the "learned profession" exemption from the Sherman Act. I am respectfully of the opinion that there is no such exemption and that none was ever intended by the Congress. One of the slender supports upon which the doctrine is said to rest has itself been destroyed by the Supreme Court. In Radovich v. National Football League, 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957), the Supreme Court had occasion to reexamine Mr. Justice Holmes' opinion in *Federal Baseball*. In refusing to extend the baseball umbrella to cover football, Mr. Justice Clark explained that the Court had adhered to the baseball exemption from the Sherman Act "because it . . . . concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at best was of dubious validity." *Id.* at 450. In virtually conceding that it is nonsense to have baseball outside the Sherman Act and football within it, Mr. Justice Clark noted, "were we considering the question of baseball for the first time upon a clean slate we would have no doubts." *Id.* at 452.[7]

The Court's repudiation of the rationale for *Federal Baseball* and its twice-repeated refusal to express any opinion on the learned professions leave the claimed exemption without any affirmative support in Supreme Court cases. I do not find the dicta from another era persuasive, much less compelling, and I am unable to perceive any reason why lawyers should be free to fix prices when carpenters cannot. In the opinion below, Judge Bryan said:

> The scope of the statutory language in the Sherman Act is so expansive that courts have been reluctant to find exceptions. The language explicitly states that "*every* contract, combination or conspiracy which restrains commerce among several states is unlawful." (Emphasis supplied.) Illustrative of this reluctance is the refusal to extend baseball's exempt status to other professional sports . . . . The fact that specific exemptions are clearly delineated suggests that ambiguities should be resolved in favor of inclusion. This is especially true where price-fixing is involved since it has been declared both pernicious and lacking in any redeeming social value.

355 F.Supp. at 493 [citations omitted]. I agree with his analysis. I do not think this court should create another exemption that will almost certainly lead to the same problems that *Federal Baseball* has given the Supreme Court. Members of other "learned professions" will no doubt seek the same exemption, and the label will be of little help in deciding whether to sanction price fixing by architects, marriage counselors, dentists, and other groups that operate under ethical standards.

> [A]rticulating the reasons lawyers need a fee schedule, as distinguished from other groups which perform public services, might present some embarrassing difficulties and lead the courts into a quagmire in determining the relative societal importance of all groups seeking exemption.

Note, The Wisconsin Minimum Fee Schedule: A Problem of Antitrust, 1968 Wisconsin L.Rev. 1237, 1257 (footnotes omitted).

Although the practice of law is a learned profession, it is pursued for the purpose (among others) of earning a living. To that extent I think it falls within the strictures of the Sherman Act, and I would affirm the decision below.

7. Organized football was not the first enterprise to seek an antitrust exemption under *Federal Baseball*. The Supreme Court had earlier rejected the pleas of organized boxing and the theater. United States v. International Boxing Club, Inc., 348 U.S. 236, 75 S.Ct. 259, 99 L.Ed. 290 (1955); United States v. Shubert, 348 U.S. 222, 75 S.Ct. 277, 99 L.Ed. 279 (1955).

APPENDIX C

JUDGMENT

United States Court of Appeals

for the

Fourth Circuit

No. 73-1247

Lewis H. Goldfarb, and
Ruth S. Goldfarb,

Appellants,

vs.

Virginia State Bar and
Fairfax County Bar Association,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

[Filed, May 8, 1974
William K. Slate, II
Clerk]

/s/ William K. Slate II
CLERK

[CERTIFICATE]

JUDGMENT

United States Court of Appeals

for the

Fourth Circuit

No. 73-1248

Lewis H. Goldfarb and
Ruth S. Goldfarb,

Appellees,

v.

Fairfax County Bar Association,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed and vacated.

[Filed May 8, 1974
William K. Slate, II
Clerk]

/s/ William K. Slate II
CLERK

[CERTIFICATE]